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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1946

No. 69

AMERICAN STEVEDORES, INC., PETITIONER,

vs.

ROSARIO PORELLO AND THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 25, 1946.

CERTIORARI GRANTED MAY 6, 1946.

SUPREME COURT OF THE UNITED STATES

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INDEX

	Original	Print
Proceedings in U. S. C. C. A., Second Circuit	a	1
Appendix to brief of appellant, United States of America	a	1
Statement Under Rule 13(4)	1	1
Libel	3	2
Respondent's Exceptions to Libel	8	5
Exceptive Allegations	9	6
Opinion of Coxe, J., Overruling Exceptions to Libel	11	7
Order of Coxe, J., Overruling Exceptions to Libel	13	8
Amended Libel	14	9
Answer of United States of America	18	11
Petition Under 56th Rule in Admiralty	21	13
Answer of American Stevedores, Inc., to Amended Libel and to Petition	24	15
Interrogatories Propounded by the Respondent-Impleaded, American Stevedores, Inc., to Libellant	29	18
Stenographer's Minutes of Trial, Excerpts	31	19
Libellant's witnesses:		
James J. Hession:		
Direct	32	20
Cross	34	22
Redirect	45	30

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 1, 1946.

—5956

	Original	Print
Appendix to brief of appellant, United States of America—Continued		
Stenographer's Minutes of Trial, Excerpts—Continued		
Respondent's witnesses:		
Francisco J. L'Hanso:		
Direct	46	32
Redirect	54	38
John M. Gillespie:		
Direct	54	38
Cross	62	45
Santo Di Mare (Deposition)	66	48
George T. Brew:		
Direct	74	55
Cross	86	64
Redirect	87	65
Respondent's exhibits:		
G—Extracts from Contract between American Stevedores, Inc., and United States of America	88	65
M—USS Thomas Stone Measurements	90	66
Opinion of Mandelbaum, D. J.	92	68
Findings of Fact	95	70
Conclusions of Law	96	71
Amendment to Opinion	97	71
Final Decree	98	71
Assignments of Error by Respondent, United States of America	100	73
Appendix to brief of appellant, American Stevedores, Inc.	104	75
Libellant's answers to respondent's interrogatories	106	75
Stenographer's minutes of trial, excerpts	107	76
Libellant's Witnesses:		
Frank J. Igneri:		
Direct	108	77
James J. Hession:		
Direct	109	78
Respondent's Witness:		
Francisco J. L'Hanso:		
Cross	110	79
Respondent's exhibits:		
"H"—Compensation checks	113	82
"O"—Longshoremen's—Harbor Workers' Compensation Act Endorsement	115	82
Assignments of error by respondent, American Stevedores, Inc.	117	83
Opinion, Swan, J.	119	85
Judgment	125	91
Petition of appellant, American Stevedores, Inc., for a limited rehearing	126	92
Opinion, per curiam, on petition for rehearing	135	101
Order denying petition for rehearing	137	103

	Original	Print
Notice of motion for order permitting any party to take proof as to intent of parties respecting the indemnity clause, etc.	138	104
Affidavit of Gus Blair Chiarello	139	105
Affidavit of Frank W. Nolan	141	107
Affidavit of Edward Ash	143	109
Order denying motion for order permitting any party to take proof, etc.	145	111
Clerk's certificate	146	112
Order allowing certiorari	147	113
Stipulation as to record	148	113

[fol. a]

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND DISTRICT

ROSARIO PORELLO, Libellant-Appellant,

against

UNITED STATES OF AMERICA, Respondent-Appellant,

and

AMERICAN STEVEDORES, INC., Respondent-Impleaded-Appellant.

APPENDIX TO BRIEF OF RESPONDENT-APPELLANT, UNITED STATES OF AMERICA—Filed September 7, 1945

On appeal from the United States District Court for the Southern District of New York

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[fol. 1] UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE SECOND CIRCUIT

[Title omitted]

STATEMENT UNDER RULE 13 (4)

This suit was commenced by the filling of a libel against United States of America on March 29, 1943. On November 22, 1943 an amended libel was filed.

The answer of Respondent, United States of America, was filed on November 26, 1943. On May 8, 1944 United States of America filed a petition under Admiralty Rule 56 impleading American Stevedores, Inc. Respondent-impleaded, American Stevedores, Inc., filed its answer to the amended libel and to the impleading petition on June 15, 1944.

There was no arrest or attachment.

[fol. 2] Trial took place on November 6, 8, 9 and 10, 1944 before Honorable Samuel Mandelbaum.

No question was referred to a commissioner, master, or referee.

A final decree for the libellant against the respondent and respondent-impleaded was entered on December 21, 1944.

Notice of appeal was served and allowance obtained on March 14, 1945.

Proctor for the libellant is Jacob Rassner, 220 Broadway, Borough of Manhattan, City of New York.

Proctor for United States of America is John F. X. McGohey, Howard F. Fanning of counsel, 45 Broadway, Borough of Manhattan, City of New York.

Proctors for American Stevedores, Inc. are Alexander & Ash, Edward Ash of counsel, 76 Beaver Street, Borough of Manhattan, City of New York.

[fol. 3] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

ROSARIO PORELLO, Libelant,

against

UNITED STATES OF AMERICA and WAR SHIPPING ADMINISTRATION, Respondents.

LIBEL

To the Honorable Judges of the United States District Court for the Southern District of New York.

The libel of Rosario Porello, against the United States of America and War Shipping Administration in an action under the provisions of suits in Admiralty Act of 1920, for the recovery of damages sustained.

Libel by Seamen under Special Rule for Seamen to Sue:

First: That at all the times hereinafter mentioned, the respondent, United States of America, was and is a corporation sovereign, which has by law consented to be sued.

Second: That upon information and belief, that at all the times hereinafter mentioned, the respondent, War Shipping Administration is and was a governmental agency created by law and established for the purpose, among other things, [fol. 4] of purchasing, chartering, leasing, managing and

operating vessels for and on behalf of the respondent, United States of America.

Third: That upon information and belief, that at all the times hereinafter mentioned, the respondent, United States of America, owned a certain steamship or vessel known as the S. S. "Thomas Stone", which is now in or about to come within the jurisdiction of this Honorable Court.

Fourth: That upon information and belief, that at all the times hereinafter mentioned, the respondent, War Shipping Administration, owned a certain steamship or vessel known as the S. S. "Thomas Stone", which is now in or about to come within the jurisdiction of this Honorable Court.

Fifth: That at all the times hereinafter mentioned, the respondent, United States of America, operated, managed and controlled a certain steamship or vessel known as the S. S. "Thomas Stone", which is now in or about to come come within the jurisidiction of this Honorable Court.

Sixth: That at all the times hereinafter mentioned, the respondent, War Shipping Administration, operated, managed and controlled a certain steamship or vessel known as the S. S. "Thomas Stone", which is now in or about to become within the jurisdiction of this Honorable Court.

Seventh: That at all the times hereinafter mentioned the said S. S. "Thomas Stone", was flying the American flag [fol. 5] and was of American registry and engaged as a merchant vessel.

Eighth: That at all the times hereinafter mentioned the said S. S. "Thomas Stone", was documented and registered in the name of the United States of America and/or the War Shipping Administration and was operated for and on behalf of the United States of America.

Ninth: That at all the times hereinafter mentioned, the libelant was and still is a citizen of the United States of America and of the State of New York.

Tenth: That at all the times hereinafter mentioned, the libelant was employed as a seaman.

Eleventh: That at all the times hereinafter mentioned, the libelant was employed aboard the vessel, S. S. "Thomas Stone".

Twelfth: That at all the times hereinafter mentioned, the libelant was engaged in maritime duties.

Thirteenth: That on or about the 23rd day of September, 1942, while the libelant was carefully, properly, prudently employed aboard the vessel aforementioned, he was suddenly and without any notice or warning caused to suffer the injuries hereinafter more particularly described, by reason of the carelessness, recklessness and negligence of the respondents, their servants, agents and employees, in failing, neglecting and omitting to provide the libelant with a safe place wherein to work; in failing to provide him with a seaworthy vessel; and without safe, proper and adequate [fol. 6] tools, appliances and implements, including a winch and its appurtenances; and the respondents were further at fault in providing a winch and appurtenances which were in a poor, broken and dilapidated condition, out of order and repair; and in failing to take any means or precautions to remedy or rectify the said conditions, after due notice thereof; in failing to properly supervise the work in question; all of which resulted in certain cargo coming down with unusual force and violence and coming in violent contact with the person of the libelant, resulting in his suffering the injuries hereinafter more particularly described; and the respondents were otherwise careless, reckless and negligent in the premises, without any fault or contributory negligence on the part of the libelant.

Fourteenth: That by reason of the foregoing, libelant suffered injuries to his head, body and limbs and was rendered sick, sore, lame and disabled and so remains; has suffered severe shock to his entire nervous system; has been and will be prevented from working; has been and still is under hospital care and treatment; has suffered and still suffers great pain; has lost and will continue to lose large sums of money which he otherwise would have earned; has spent and upon information and belief will have to expend large sums of money for medical and surgical aid and attendance and medicines, and upon information and belief, has been permanently injured all to his damage in the sum of Fifty Thousand ($50,000.00) Dollars.

Fifteenth: That all and singular the foregoing matters are true and within the Admiralty and Maritime jurisdiction of the United States and of this Honorable Court and [fol. 7] that the respondents be compelled to answer upon oath, all and singular the matters aforesaid, and that this Honorable Court may be pleased to decree payment of your libelant's claim.

Wherefore, libelant prays that the respondent and each of them be required to appear and answer all and singular the matters aforesaid and that this Honorable Court may be pleased to decree payment of your libelant's claim for damages in the within cause of action, to wit, the sum of Fifty Thousand ($50,000.00) Dollars, together with the costs and disbursements of this action, and that libelant may have such other and further relief as to this Court may seem just and proper.

Jacob Rassner, Proctor for Libelant, Office & P. O. Address, 220 Broadway, Borough of Manhattan, City of New York.

(Verified by Jacob Rassner, Attorney for Libelant, on March 26, 1943.)

[fol. 8] UNITED STATES DISTRICT COURT

[Title omitted]

RESPONDENT'S EXCEPTIONS TO LIBEL—Filed June 23, 1943

To the Honorable, the Judges of the United States District Court for the Southern District of New York:

The exceptions of the United States of America, respondent in the above-entitled cause, respectfully show:

I

It appears from the exceptive allegations hereunto attached, that the libellant has no cause of action by reason of the matters alleged in the libel, or any of them.

Wherefore, respondent prays that said libel be dismissed and that the United States of America may recover its costs and disbursements herein.

Howard F. Corcoran, Acting United States Attorney, Proctor for Respondent, United States of America, Office and P. O. Address, 45 Broadway, Borough of Manhattan, City of New York.

[fol. 9] UNITED STATES DISTRICT COURT

[Title omitted]

EXCEPTIVE ALLEGATIONS

To the Honorable, the Judges of the United States District Court for the Southern District of New York:

The exceptive allegations of the United States of America, respondent in the above-entitled cause, respectfully show:

I

The United States of America was and is a sovereign power.

II

At all of the times mentioned in the libel, the respondent, United States of America, was and now is the owner of a certain vessel known as the United States Navy Transport Thomas Stone (formerly President Van Buren) being [fol. 10] operated on behalf of the United States of America as represented by the United States Navy.

III

The said United States Navy Transport Thomas Stone (formerly President Van Buren) at the times mentioned in the libel was not employed as a merchant vessel but as a public vessel of the United States.

IV

The libel, which is brought by Rosario Porello to recover for personal injuries sustained on the United States Navy Transport Thomas Stone (formerly President Van Buren), cannot be maintained under the Public Vessels Act, 1925, 46 U. S. C. A., Section 781.

V

By reason of the matters hereinbefore set forth, the libellant has no cause of action for any of the matters set forth in said libel, if true or at all.

Howard F. Corcoran, Acting United States Attorney, Proctor for Respondent, United States of America, Office and P. O. Address, 45 Broadway, Borough of Manhattan, City of New York.

[fol. 11] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

A-127-36 OP. NO. 14,891

ROSARIO PORELLO,

Libellant.

against

UNITED STATES OF AMERICA and WAR SHIPPING ADMINISTRATION

Respondents.

APPEARANCES:

Jacob Rassner, Esq., Proctor for Libellant. James B. McNally, U. S. Attorney, for Respondent; William E. Collins, Esq., Special Assistant to the U. S. Attorney, of Counsel, Anthony Blasi, Esq., Advocate.

OPINION OF COXE, J., OVERRULING EXCEPTIONS TO LIBEL—Filed Oct. 18, 1943

COXE, D. J.:

These are exceptions filed by the United States to a libel for damages for personal injuries.

The libellant was a stevedore in the employ of an independent stevedoring company engaged in loading the S. S. *Thomas Stone*, a public vessel of the United States. He was injured on September 23d, 1942, while working on the vessel, and the libel alleges that his injuries were caused solely by the negligence of the United States.

[fol. 12] This suit is brought under the act of March 3, 1925 (43 Stat. 1112). Section 1 of this Act (46 U. S. C. A. §781) reads as follows:

> "A libel in personam in admiralty may be brought against the United States, or a petition impleading the United States, for damages caused by a public vessel of the United States, and for compensation for towage and salvage services, including contract salvage, rendered to a public vessel of the United States: *Provided*, that the cause of the action arose after the 6th day of April, 1920".

The government contends that the suit is not authorized by the statute. The argument is that the words "damages

caused by a public vessel" refer to damage done physically by the vessel itself, as is the case of a collision, and not to damages for personal injuries caused by the negligence of employees. I do not think that this argument is tenable; the vessel has no volition of its own and can act only through employees; it causes the damage just as much in personal injury cases as in cases involving collision damage. The language of the section is clear as it stands, and I can see no reason to read into the statute qualifying words which would materially restrict its application. See *Dobson* v. *U. S.*, 27 F. 2d 807, cert. denied, 278 U. S. 653; *State of Maine* v. *U. S.* 45 F. Supp. 35.

The exceptions filed by the United States to the libel are overruled.

October 18, 1943.

Alfred E. Coxe, U. S. D. J.

[fol. 13] UNITED STATES DISTRICT COURT

[Title omitted]

ORDER OF COXE, J., OVERRULING EXCEPTIONS TO LIBEL—Filed October 25, 1943

The respondent, United States of America, having filed exceptions and exceptive allegations, and the argument having duly come on to be heard before this Court on September 21, 1943, and after filing the notice of argument dated September 20, 1943, and after hearing Anthony Blasi, of counsel for the respondent, in support of the exceptions and exceptive allegations, and Jacob Rassner, proctor for libellant, in opposition, and due deliberation having been had thereon, it is

Ordered that the exceptions filed by the United States to the libel are overruled, and it is further

Ordered that the respondents' time to serve and file its answer is hereby extended to the first day of November, 1943.

Dated: New York City, October 25, 1943.

Alfred C. Coxe, U. S. D. J.

[fol. 14] UNITED STATES DISTRICT COURT

[Title omitted]

AMENDED LIBEL

To the Honorable Judges of the United States District Court for the Southern District of New York.

The amended libel of Rosario Porello, against the United States of America under the provisions of Public Vessels Act 46, U. S. C. A. Sec. 781, the recovery of damages sustained by reason of personal injuries.

Libel By Seamen Under Special Rule For Seamen to Sue:

First: That at all the times hereinafter mentioned, the respondent, United States of America, was and is a corporation sovereign, which has by law consented to be sued.

Second: That upon information and belief, that at all the times hereinafter mentioned, the respondent, United [fol. 15] States of America, owned a certain steamship or vessel known as the U. S. S. "Thomas Stone," which was at the time of commencing suit is now in or about to come within the jurisdiction of this Honorable Court.

Third: That at all the times hereinafter mentioned, the respondent, United States of America, operated, managed and controlled a certain steamship or vessel known as the U. S. S. "Thomas Stone," which was at the time of commencing suit now is in or about to come within the jurisdiction of this Honorable Court.

Fourth: That at all the times hereinafter mentioned, the said U. S. S. "Thomas Stone," was flying the American flag as a public vessel and commissioned by the United States of America to the United States Navy to be operated by the United States Navy as a public vessel.

Fifth: That at all the times hereinafter mentioned, the said U. S. S. "Thomas Stone" was documented and registered in the name of the United States of America.

Sixth: That at all the times hereinafter mentioned, the libelant was and still is a citizen of the United States of America and of the State of New York.

Seventh: That at all the times hereinafter mentioned, the libelant was employed as a longshoreman aboard said vessel.

Eighth: That at all the times hereinafter mentioned, the libelant was employed aboard the vessel, U. S. S. "Thomas Stone."

[fol. 16] Ninth: That at all the times hereinafter mentioned, the libelant was engaged in maritime duties.

Tenth: That on or about the 23rd day of September, 1942, while the libelant was carefully, properly and prudently employed aboard the vessel aforementioned, he was suddenly and without any notice or warning caused to suffer the injuries hereinafter more particularly described, by reason of the carelessness, recklessness and negligence of the respondent, its servants, agents and employees, in failing, neglecting and omitting to provide the libelant with a safe place wherein to work; in failing to provide him with a seaworthy vessel; and without safe, proper and adequate tools, appliances and implements, including a winch and its appurtenances; and the respondent was further at fault in providing a winch and appurtenances which were in a poor, broken and dilapidated condition, out of order and repair; and in failing to take any means or precautions to remedy or rectify the said conditions, after due notice thereof; in failing to properly supervise the work in question; all of which resulted in certain cargo coming down with unusual force and violence and coming in violent contact with said libelant, resulting in his suffering the injuries hereinafter more particularly described; and the respondent was otherwise careless, reckless and negligent in the premises, without any fault or contributory negligence on the part of the libelant.

Eleventh: That by reason of the foregoing, libelant suffered injuries to his head, body and limbs and was rendered sick, sore, lame and disabled and so remains; has suffered severe shock to his entire nervous system; has suffered and still suffers great pain; has lost and will continue to lose sums of money which he otherwise would [fol. 17] have earned; has spent and upon information and belief will have to expend sums of money for medical and surgical aid and attendance and medicines, and upon information and belief, has been permanently injured all to

his damage in the sum of Fifty Thousand ($50,000.00) Dollars.

Twelfth: That all and singular the foregoing matters are true and within the Admiralty and Maritime jurisdiction of the United States and of this Honorable Court and that the respondent be compelled to answer upon oath, all and singular the matters aforesaid, and that this Honorable Court may be pleased to decree payment of your libelant's claim.

Wherefore, libelant prays that the respondent be required to appear and answer all and singular the matters aforesaid and that this Honorable Court may be pleased to decree payment of your libelant's claim for damages in the within cause of action, to wit, the sum of Fifty Thousand ($50,000.00) Dollars, together with the costs and disbursements of this action, and that libelant may have such other and further relief as to this Court may seem just and proper.

Jacob Rassner, Proctor for Libelant, Office & P. O. Address 220 Broadway, Borough of Manhattan, City of New York.

(Verified by Jacob Rassner, Proctor for Libelant, on November 18, 1943.)

[fol. 18] UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF UNITED STATES OF AMERICA

The Answer of the United States of America to the amended libel herein, alleges, upon information and belief, as follows:

First: It admits that at all the times mentioned in the libel it was and still is a sovereign corporation. It denies each and every other allegation contained in Article First and asserts that it is immune from suit on account of the matters alleged in the libel.

Second: It admits the allegations contained in Article Second.

Third: It admits the allegations contained in Article Third.

Fourth: It admits the allegations contained in Article Fourth.

Fifth: It denies each and every allegation contained in Article Fifth, except it admits that U. S. S. Thomas Stone was a commissioned vessel of the U. S. Navy.

[fol. 19] Sixth: It denies that it has any knowledge or information sufficient to form a belief as to the allegations contained in Article Sixth.

Seventh: It denies that it has any knowledge or information sufficient to form a belief as to the allegations contained in Article Seventh.

Eighth: It denies that it has any knowledge or information sufficient to form a belief as to the allegations contained in Article Eighth.

Ninth: It denies that it has any knowledge or information sufficient to form a belief as to the allegations contained in Article Ninth.

Tenth: It denies each and every allegation contained in Article Tenth.

Eleventh: It denies each and every allegation contained in Article Eleventh.

Twelfth: It denies each and every allegation contained in Article Twelfth.

Further answering the libel and as a first, separate, complete and distinct defense thereto, respondent alleges upon information and belief as follows:

Thirteenth: Any injuries alleged in the libel to have been suffered by libelant were caused in whole or in part by libelant's own or by the negligence of his co-employees or by the negligence of a person or persons for whom this respondent is not liable.

[fol. 20] Further answering the libel and as a second, separate, complete and distinct defense thereto, respondent alleges upon information and belief as follows:

Fourteenth: That the injuries to the libelant, if any, arose out of certain risks, dangers, and hazards all of which were open, obvious and well known to the libelant

at and before the said injury, and all of which had been assumed by the libelant.

Further answering the libel and as a third, separate, and distinct defense thereto, respondent alleges upon information and belief as follows:

Fifteenth: Respondent objects to the exercise by this court of jurisdiction in this action on the ground that the action has not been brought in the proper district.

Wherefore, respondent demands that the libel herein be dismissed with costs to the respondent as against the libelant and for such other, further and different relief as the justice of the cause may require.

James B. M. McNally, United States Attorney, Proctor for Respondent, United States of America: Office & P. O. Address: 45 Broadway, New York City.

(Verified by Howard F. Fanning, Special Assistant to the U. S. Attorney, on November 25, 1943.)

[fol. 21] UNITED STATES DISTRICT COURT

[Title omitted]

PETITION UNDER 56TH RULE IN ADMIRALTY

To the District Court of the United States for the Southern District of New York:

The petition of United States of America, in the above cause, respectfully shows:

First: Your petitioner is and was at the times hereinafter mentioned a sovereign corporation and the owner of the USS Thomas Stone, a public vessel, commissioned by the United States Navy. The libelant above named has filed suit in this action to recover Fifty Thousand Dollars ($50,000.00) damages for personal injuries allegedly sustained on September 23, 1942, while employed as a longshoreman loading said vessel at Pier 11, Staten Island, New York. The libelant herein alleges that said injuries were sustained by reason of a defective winch of said vessel, [fol. 22] causing the cargo or draft to come into violent contact with the beams of the 'tween deck hatch covers,

dislodging the same, all of which came down and parts of which struck the libelant.

Second: Your petitioner further alleges on information and belief that such injuries as the libelant sustained were due solely to the negligence, if any negligence be established, of American Stevedores, Inc., the employer of the libelant and a corporation which had contracted with your petitioner to load said vessel under a written agreement dated July 12, 1942, providing in part as follows:

> "12. The Stevedore performing any service under this schedule shall be responsible for any and all damage or injury to persons and cargo while loading or otherwise handling or stowing the same, to any ship including its apparel and equipment, wharves, docks, lighters, elevators, cars and car-floats used in connection therewith, through the negligence or fault of the Stevedore, his employees and servants."

Third: Your petitioner is informed and believes that American Stevedores, Inc. is a domestic corporation of the State of New York and has its principal place of business at 115 Broad Street, New York City, within this District and was in charge of the operation of said winch, and the loading of said vessel, and should be proceeded against herein and should be a party to this suit to complete the determination of the controversy.

Fourth: Your petitioner is informed and believes that all and singular the premises are true and within the [fol. 23] admiralty and maritime jurisdiction of the United States and of this Honorable Court.

Wherefore, petitioner prays that a citation issue in due form of law to American Stevedores, Inc., citing it to appear and answer all and singular the matters aforesaid, and that American Stevedores, Inc. be proceeded against herein as though originally made a party hereto and that if said respondent, American Stevedores, Inc., cannot be served within this District, then that its property therein be seized and attached to answer the prayer of the libelant herein and that the libel herein be dismissed as to this petitioner, and that if the Court finds the libelant entitled to recovery, then, that such recovery be had against the

American Stevedores, Inc., and that petitioner have such other and further relief as to the Court shall seem just.

James. B. M. McNally, United States Attorney,
Proctor for Respondent-Petitioner, 45 Broadway,
New York, N. Y.

(Verified by Howard F. Fanning, Special Assistant to U. S. Attorney, on May 8, 1944.)

[fol. 24] UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF AMERICAN STEVEDORES, INC. TO AMENDED LIBEL AND TO PETITION

The answer of American Stevedores, Inc., respondent-impleaded, to the amended libel and to the petition, respectfully alleges and shows upon information and belief, as follows:

Answering the Amended Libel

First: Denies any knowledge or information sufficient to form a belief as to each and every allegation set forth in paragraphs marked "Second," "Third," "Fourth," [fol. 25] "Fifth" and "Sixth" of the amended libel herein.

Second: Admits the allegations contained in paragraphs marked "Seventh," "Eighth" and "Ninth" of the amended libel herein.

Third: Admits that on or about the 23rd day of September, 1942, while libellant was aboard a vessel owned, operated, chartered or managed by the respondent, United States of America, he was injured, and denies any knowledge or information sufficient to form a belief as to each and every remaining allegation set forth in paragraphs marked "Tenth" and "Eleventh" of the amended libel herein.

Fourth: Denies each and every allegation set forth in paragraph marked "Twelfth" of the amended libel herein.

Answering the Petition

Fifth: Admits so much of the "First" paragraph of the petition as alleges that the United States is a sovereign

corporation; that libellant above named has filed a suit in this proceeding to recover $50,000.00 for personal injuries allegedly sustained on September 23, 1942, while employed as a longshoreman loading a vessel; except as so admitted, respondent-impleaded denies any knowledge or information sufficient to form a belief as to each and every remaining allegation set forth in paragraph marked "First" of the petition herein.

[fol. 26] Sixth: Admits that on or about the 17th day of July, 1942, the United States of America and this respondent-impleaded entered into a written agreement, which agreement contained the paragraph quoted in the "Second" paragraph of the petition herein; except as so admitted, this respondent-impleaded denies each and every remaining allegation set forth in paragraph marked "Second" of the petition herein.

Seventh: Admits that this respondent-impleaded is a domestic corporation of the State of New York, having an office in the Borough of Manhattan, City of New York, and within this District; that its employees were operating a winch on the vessel referred to in the petition herein which was used in connection with the loading of the said vessel; except as so admitted, respondent-impleaded denies each and every remaining allegation in paragraph marked "Third" of the petition herein.

Eighth: Denies each and every allegation set forth in paragraph marked "Fourth" of the petition herein.

Further answering the said amended libel and petition, and as a first, separate, complete and distinct defense thereto, respondent-impleaded alleges upon information and belief:

Ninth: That the libellant at all the times referred to in the amended libel was a longshoreman and was an employee of the American Stevedores, Inc., a corporation, and was engaged pursuant to such employment, in the occupation of longshoreman upon the navigable waters of the United States.

[fol. 27] Tenth: That there was in full force and effect at the time referred to in the amended libel, a statute of the United States, known as the Longshoremen's & Harbor

Workers' Compensation Act, being Chapter 509, 44 Stat. 1424, as amended.

Eleventh: That the libellant's said employer, American Stevedores, Inc., had, prior to September 23, 1942, duly and fully complied with the provisions of the said statute and secured to its employees, including the libellant herein, compensation as therein provided.

Twelfth: That pursuant to the provisions of the said statute and in accordance with the terms thereof, there was paid to the libellant by the American Stevedores, Inc., or in its behalf, by its said compensation insurance carrier, by reason of the said alleged injuries referred to in the amended libel herein, and any disability and loss of earnings resulting therefrom, compensation payments aggregating the sum of $840.00 and medical expenses amounting in the aggregate to $581.77, or a total of $1421.77.

Thirteenth: That by the acceptance and retention of the said payments, libellant has exercised his election of remedy which is exclusive under the said enactment and this Court has not jurisdiction to grant any recovery herein to the libellant.

Further Answering the Said Amended Libel and Petition, and as a Second, Separate, Complete and Distinct Defense Thereto, Respondent-Impleaded Alleges upon Information and Belief:

[fol. 28] Fourteenth: That at the time of the alleged injury, referred to in the amended libel, the libellant had all knowledge of the dangers, if any, of the employment in which he was engaged; that the alleged injury therein referred to was caused by a risk of the said occupation which libellant well knew and that libellant had assumed said risk.

Further Answering the Said Amended Libel and Petition and as a Third, Separate, Complete and Distinct Defense Thereto, Respondent-Impleaded Alleges upon Information and Belief:

Fifteenth: That if the libellant met with an accident, such as is alleged in the amended libel herein, and sustained injuries as therein set forth, said accident was caused and said injuries were sustained solely by reason of the negli-

gence of the libellant, and not by reason of any negligence on the part of this respondent-impleaded, its agents or servants.

Wherefore, respondent-impleaded prays for the entry of a decree, dismissing the amended libel and the petition herein as against it, with costs.

Alexander & Ash, Proctors for Respondent-Impleaded, American Stevedores, Inc., 76 Beaver Street, New York City.

(Verified by Gus Blair Chiarello, Vice President of American Stevedores, Inc., on June 14, 1944.)

[fol. 29] IN UNITED STATES DISTRICT COURT

INTERROGATORIES PROPOUNDED BY THE RESPONDENT-IMPLEADED, AMERICAN STEVEDORES, INC., TO BE ANSWERED BY LIBELLANT, UNDER OATH

1. State whether you received, subsequent to September 23, 1942, any sums or monies from the American Stevedores, Inc., or anyone in its behalf, or for its account.

2. If your answer to the preceding interrogatory is in the affirmative, then state:

(a) The date or dates, or approximate dates, whereon such sums were received by you.

(b) The amount of such payments or sums received by you on each occasion, and the total aggregate amount.

(c) Whether such payments were for wages or services performed by you, and if so, the nature of such services performed by you subsequent to September 23, 1942, for the American Stevedors, Inc.

(d) Whether such payments were for compensation.

(e) For what reason the said sums were sent to, and received by you.

3. State whether you filed any claim for compensation with the U. S. Employees Compensation Commission, and if so, the date when the same was so filed by you.

[fol. 30] 4. State whether you at any time subsequent to September 23, 1942, attended at the office of the U. S. Employees Compensation Commission, and if so, state:

(a) The date you attended at such office.

(b) The purpose of such visit.

(c) What took place at such visit.

5. State the date when you first became advised, informed or determined to institute suit against the United States or any of its departments or bureaus, for the injuries claimed to have been sustained by you on September 23, 1942.

Alexander & Ash, Proctors for Respondent-Impleaded.

[fol. 31] IN UNITED STATES DISTRICT COURT

EXCERPTS FROM STENOGRAPHER'S TRANSCRIPT OF MINUTES

Mr. Fanning: When this case was originally set up, your Honor, it was claimed that the accident was caused by a faulty winch. Of course, so far as the winch was concerned, this Army Officer, whom I have heard about today for the first time, would be of no moment. After the deposition of the foreman of the longshoremen had been taken—I took the depositions of two enlisted men in the United States Navy, they were electrician mates, and when I undertook to go into the condition of the winches Mr. Rassner made this statement which was put on the record: "In the interest of saving the time of the people and parties concerned, I would like to have the record show that it is my intention as proctor for the libellant to move to amend the libel at the trial of the above entitled action and predicate the cause of action primarily on the fact that a certain beam aboard the vessel was in defective condition, more particularly that one lock was broken, and that the beam and its appurtenances were not reasonably safe for the purposes intended, and it was the defective condition of the vessel in this particular which was the proximate cause of the accident, and in the interest of saving time we will rely solely upon this condition."

And I said. "And you concede that the winches at No. 1 hatch were in proper repair and working order?"

And Mr. Rassner replied, "Only for the purpose of this action, we do not have any actual position to take on that score, but to clarify the record no claim will be [fol. 32] made by this libellant in this action or any other that the proximate cause of the accident or contributing cause to the accident were the conditions of the winches."

* * * * * * * *

Mr. Fanning: Well, you are claiming, as I get your statement, that there was something wrong with the winch, and when you made this statement on the taking of these depositions you completely abandoned such a claim, as appears by the record, and I claim surprise. I don't think that I should——

Mr. Rassner: Let me answer this to eliminate any question of doubt. I will concede for the purpose of this trial that the defective condition of the winch or any condition of the winch had nothing to do with the accident.

* * * * * * * *

JAMES J. HESSION, called as a witness on behalf of the libellant, being duly sworn, testified as follows:

Direct examination.

By Mr. Rassner:

Q. By whom are you employed?
A. The American Stevedores, Incorporated.
Q. In what capacity?
A. Superintendent of loading and discharging of ships.
Q. How long have you been so employed?
A. For the past five years by this organization.
Q. How long have you been in the business or occupation of loading cargo—stevedoring?
A. Oh, since 1923. About 25 years.
[fol. 33] Q. You are still engaged in the same practice today?
A. Yes.
Q. Now, on the 23rd day of September 1942 were you notified of an accident on one of the vessels that was being loaded?
A. I was.

Q. Was Mr. Porella one of the men that was injured?
A. I am sure he was.

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Q. Well now, under whose orders were the hatches (page 160) opened—No. 1 hatch opened?
A. Well, we opened them up under the orders of the pier officer. We knew in advance what to put in, down in the lower hold. We stripped the hatch deck, of the pontoons, the top-sides, and we went down through the trunkway, and knowing that we only had a small amount of rations, I think they were sea rations, to put in the lower hold with the few vehicles, two or three, I am not quite sure, and knowing that we had a drift in the trunkway, to put in these packages, we didn't take out the forward beam in the last deck.

• • • • • • •

Q. Was there anything specifically said about that beam staying there or coming out?
A. No, sir.
Q. Now, no orders were given to remove that beam, is that correct?
A. No, sir.
Q. Now tell us about the manner of doing the work, particularly as to the directions and control of the work.
A. Well, the packages that were going into the lower hold were coming from the inshore side, off the dock, being [fol. 34] hoisted aboard down into the trunkway and stowed away in the lower hold.
Q. Who was in charge of that operation?
A. From a stevedore's point of view—of course we had a hatch boss in charge of the gang to give any orders to the gang that might be needed. They speak Italian. And there is a gangway man, naturally, to give signals to the winchman.

• • • • • • •

Q. Did you see the beam replaced? Did you see the men pull the beam back into place?
A. I did not, sir.
Q. You don't know how it was put back into place?
A. But I did notice that there wasn't a locking device on the beam.
Q. What do you mean by locking device?

A. It is a lug that automatically, when it is set, it becomes a preventive for the beam coming away.

Q. You say there was none there on the starboard side?

A. There was no locking device on the beam whatsoever.

Q. Could you tell whether one had been there and had been broken off or one had never been there?

A. It had never been put on that very hatch.

Q. You could see that, and from your experience you know none had ever been built on it?

A. That is right.

• • • • • • •

Cross examination.

By Mr. Fanning:

Q. Do you know that your foreman, Mr. De Mayo, knew before he undertook to load the vehicle in No. 1 lower [fol. 35] hold that there was no locking device on the starboard end of this beam?

A. I did not, sir. He didn't take it up with me.

Q. He was an experienced man, was he not?

A. Yes, sir.

Q. And if he knew that there was no locking device on the end of the beam, you would expect him to do something, wouldn't you?

A. Positively.

Q. You would expect him to take some means to see that the beam did not get unshipped or that the danger of unshipping it was absent?

A. That is right.

Q. It would have been perfectly apparent to this experienced man, knowing the device was not there, that if something struck it from the underneath side it might become dislodged?

A. That is quite right.

Q. It isn't an uncommon happening, is it, to have those things dislodged?

A. No. Ordinarily, as I stated previously, if it was on topsides, on the main deck, the locking device would have been noticed immediately.

Q. You remember Mr. De Mayo, don't you? He was hatch foreman there?

A. Oh, I don't know. I haven't seen De Mayo; if he is here I wouldn't know him and I would not be able to pick him out.

Q. He is the fellow that was in the Army. The fellow who was hatch boss and whose name I understand to be De Mayo has testified that before he loaded that vehicle he looked at the starboard end of the beam and he saw that there was no locking device there.

Mr. Rassner: I think his name is De Mare instead of De Mayo.

Q. Well, would De Mare mean anything more to you?

A. No, sir.

[fol. 36] Q. Under those circumstances should not he have taken some move to prevent the beam becoming unshipped?

A. Well, if he had noticed it, yes, he could have drawn the attention to somebody and——

Q. Well——

Mr. Rassner: Let us hear the rest of the answer.

A. In other words, if he had actually noticed it. But it was one of those things that I don't think that he could have noticed.

Q. Well, he says he did.

A. Well, if he did, he did.

Q. Then he should have done something about it, shouldn't he?

A. That is right.

Q. And it would have been a perfectly simple matter to pass a line around that beam and secure it so that it could not be unshipped, wouldn't it?

A. I am not quite so sure about that.

Q. What was to prevent him from putting a line around the beam and then lashing it?

A. Lash it to what, sir?

Q. Lashing it to any number of things that were nearby.

A. It was in the lower hold.

Q. What do you say? Wouldn't that have been a perfectly simple operation?

A. Not where that particular beam was laying at the time, that is, in the space she was in or what we were put-

ting in. We had put canned goods in the wings—parts of the hatch.

Q. This was above the place where the canned goods were put?

A. This was right on the level with the deck above, yes.

Q. And what would prevent the passing of a line around it and lashing it in place so it couldn't come out?

[fol. 37] A. There might have been possibilities but I don't think it would have been in order.

* * * * * * *

Q. Assuming that your foreman knew all about it, weren't there several things that he could have done to see that there was a degree of safety about the operation?

A. Yes, he could have.

* * * * * * *

Q. You said in your direct examination that when you were being paid on a tonnage basis you did everything possible you could to save time?

A. That is right.

Q. In other words, you were anxious to make for your employer the most money possible?

A. That is right.

Q. Being paid by the ton?

A. That is right.

Q. Now you also said, Mr. Hession, that inasmuch as you had just a small amount of canned goods and only two or three vehicles to go into No. 1 lower hold, it seemed to be a proper method of doing the work to leave that beam in there?

A. That is right.

* * * * * * *

By the Court:

Q. How many times did you see this fallen beam before the accident? How many times did you see it where it was?

A. Oh, I should say about two or three times.

Q. Two or three times. Having seen it two or three times, you knew or you had reason to know that a beam, [fol. 38] the way it was, without any locking device, could be easily dislodged?

A. Judge, I will answer you this way: I did not know that there wasn't any locking device on it.

Q. You saw it two or three times?

A. Yes, but I did not take notice of the locking device being off it. I don't think the licensed officer who was in charge of the hatch knew about it until such time as the beam came off. And we had put in there in the neighborhood of about 750 cases of rations which I would say, about 30 cases to the draft—so there was 25 drafts went down into the hold, and we operated the tonnage——

Q. By the simple device of tying the beam, tying it around with a rope, that would have answered the purpose of a locking device, would it not?

A. It would have, yes.

By Mr. Fanning:

Q. The fact that you had put in these 25, I think you said, drafts of canned goods would indicate to you, would it not, that if proper care were taken the work could be conducted with the beam in place and in safety?

A. That was the consensus of opinion of the Army and myself, yes, sir.

Q. Inasmuch as you were lowering machines into the hold, there is no chance of your applying the necessary pressure to dislodge the beam?

A. That is right.

Q. It is known that when there comes an occasion to lift something that the element of danger of unshipping the beam presents itself?

A. That is right.

Q. Did you go only into the lower hold when you went down there after having had the accident called to your [fol. 39] attention?

A. I was there before they started to load and after the accident.

Q. After the accident when you—did you go clear to the lower hold?

A. Right down.

Q. Did you notice then where the canned goods were in the hold?

A. If I remember rightly they were from skin to skin in the after part of the hold.

Q. Do you recall where they were with reference to the after coaming of No. 1?

A. To the after coaming of No. 1, just to the after coaming.

. . . . . .

Q. Did you at that time have just one type of spreader or were they constructed in various ways?

A. No. We had the one type. We had the oak wood spreader.

Q. What do you call the part of the gear that passes under the wheels of the vehicle? Is that a sling?

A. They are really part of a bridle sling.

Q. Part of a bridle sling?

A. That is right.

Q. That comes from the bottom around the end of the spreader, does it?

A. Yes.

Q. How is it made fast to the spreader itself? Does it pass through the hole or is the outer end of the spreader notched?

A. The outer end of the spreader is notched and it was held in place with a bolt, carriage bolt going through it. In other words, there is a carriage bolt goes through where the strain of the wire is to keep the spreader from splitting. It is a bolt that goes through there so that she takes the strain.

Q. How much of the outer end of the spreader would extend out beyond the wire itself?

A. Oh, a couple of inches.

. . . . . .

[fol. 40] Q. When you say that you took directions from the Army people, you don't mean, do you, that the Army officer directed the winchman, for instance, how many notches he should put on the winch to give it so much power; you don't mean any detailed direction of that sort, do you?

A. No, sir.

Q. And the Army officer does not give signals to raise and lower?

A. No, sir.

. . . . . .

Q. I am taking your observation of this particular ship because I understood you to have testified to that in your direct examination.

You mean, do you not, in substance, that the Army officer determined, for instance, which vehicle should go in the lower hold and which in the 'tween deck, with the idea of their being discharged when the vessel went into action?

A. That is right.

* * * * * * *

By Mr. Fanning:

Q. Now going back just a bit, Mr. Hession, referring again to the Army officer whose directions you said you followed: With reference to the operation of the winch, this Army officer does not have anything to do with that, does he?

A. No, sir.

Q. You employed an experienced man?

A. Experienced winchman, that is right.

Q. And he understands what levers he pushes to accomplish what he wants?

A. That is right.

Q. And your gangway man stands over the hatch and [fol. 41] by signaling to the winchman determines how the material shall be lowered or raised, whichever operation is taking place?

A. That is right. He gives the signals to the winchman.

Q. It is fair to say, isn't it, Mr. Hession, that the detail of the work such as that is within the control, or was within the control of the employees of American Stevedores?

A. That is right. I would say so, yes.

Q. You said there was very little clearance in the lower hold between the tank top cover and the underneath side of the beam?

A. There was just about head room for the average man.

Q. There has been testimony here that a half-ton truck had been lowered into that opening, athwartships, that when it reached the lower hold, about a foot from the lower hold, it was twisted by the men so that it was standing about fore and aft, that one end of the vehicle was under the forward beam in the third platform deck and that in that position the vehicle was raised and the beam unshipped. Would

you say that as a matter of good stevedoring practice your hatch foreman who was in the lower hold at the time should have first determined the relative positions of the vehicle or the spreader and the beam before he gave the order to raise it, having in mind the small clearance?

A. I am not sure whether he was there or not.

Q. Well, I am asking you to assume that he was—he has so testified and so have the other witnesses—wouldn't you expect as a matter of good stevedoring practice that he would have found out where the load was with reference to the beam before he gave an order to raise it?

. . . . . .

[fol. 42] A. Assuming that he has been in the lower hold?

Q. That is right; assume that he is in the lower hold.

A. Then I would assume that he would give an order to raise it a little just enough to take a strain on it so that he could swing it to whatever position he might want to land it.

Q. Assuming that it is already about a foot off the deck so it can be moved. Now wouldn't you say it was good stevedoring practice to look before that vehicle was moved at all, having in mind the small amount of clearance?

A. Well, if he gives a signal to the gangway man, if he is down the hold and the gangway man is up over the hatch coaming he takes the signal to come up a little bit, the gangway man gives it to the up-and-down winchman, so there is a factor there on whether the winchman puts too much juice on the fall and she comes up too quick. Now he may have had full intentions of just raising it possibly six inches, just enough to swing it, but——

Q. What was to prevent him from swinging it as it hung on the fall? It was clear of the deck, according to the evidence.

A. I wasn't there.

Q. You can't think of anything that would prevent it from swinging?

A. Not if it was clear of the deck.

Q. Having in mind that this foreman knew that there was no locking device on the end of that beam, that he could see by looking just how much clearance he had, would you not say that it was encumbent upon him to find out where the vehicle was with reference to the beam before he gave the order to raise it any amount?

. . . . . .

[fol. 43] Q. That is what a careful man should do, isn't it, Mr. Hession—look and see what the situation is?

A. Of course I am assuming everything now as to what transpired.

Q. That is all I am asking you to do.

A. All I know is that when I went down into the hold, it was after the accident happened that he discovered that the lug was—locking device was off the beam. He did not tell me that he knew about it prior to that.

Q. I am asking you to assume that, and to assume that there was a small amount of clearance, and that one end of the vehicle was under the beam, having been swung around fore and aft. Wouldn't you think that it was encumbent upon him to find out where the vehicle was with reference to the beam before he said, "Take her up"?

A. I would think he did that.

Q. You would think he would do that——

A. I think he did that.

Q. —because that would be the requirement of care that would be upon him, wouldn't it?

A. Right.

Q. Now assume that having once given the order to take her up and the vehicle not moving upward he then gave a second order to take her up, wouldn't you assume that careful practice would require him to look before he gave the second order?

A. I shall answer that this way. The average man giving a signal, whether he is a gangway man or a hatch boss or any one of the deckmen, he gives a signal in such a way that everything is clear—come ahead, the up-and-down and the Burton, or he will say, "Take a strain." Now he does not say it maybe in English to his Italian winch driver; he tells him in the Italian tongue to take a strain. Now I don't think he gave any order to take this lift right out of the hatch again.

[fol. 44] Q. Well, I am asking you to assume. You are a very experienced man and I take it from the number of years you have been along the beach you know how these operations should be conducted, don't you?

A. That is right.

Q. You are interested in safety at all times, aren't you?

A. You are right.

Q. Safety of the employees and the prevention of accidents is a thing you have drilled into you day after day.

Now I am asking you to assume that the hatch foreman knew the amount of clearance, he knew the locking device was missing from one end of the beam, he knew that one end of the vehicle was under the beam, that he gave the order to take her up and the vehicle did not move. Wouldn't you expect that that would indicate to a careful man that he was caught somewhere and there was something preventing it from moving upward?

A. Well, there's different angles to it. Maybe the signal was not relayed properly and the——

Q. If you were working there, as a careful person you would have looked and attempted to determine why it did not go up when the order was given, wouldn't you?

A. I assume I would.

Q. Of course you would, as a careful person. Is there any doubt about that?

Mr. Rassner: There is no proof that he did not. I object to this, assuming facts which are absolutely contrary to the evidence.

The Court: I will allow it.

Q. You in the position of hatch foreman would first have determined where the vehicle was with reference to the [fol. 45] beam before you gave any order to raise it, wouldn't you?

A. Positively.

Q. Certainly you would. And if an order was given and still the vehicle was not lifted, it would have occurred to you, would it not, that there was some reason why it didn't go up?

A. Well, I don't know why. I haven't the slightest idea, because I wasn't there.

Q. Well, the evidence is that immediately the second order was carried out and the vehicle raised the beam was unshipped. That indicates to you, does it not, that the spreader or something was caught on the beam when they started to raise it?

A. Something must have caught on to the beam.

* * * * * * *

Cross-examination.

By Mr. Ash:

Q. Where is the hatch boss stationed?

A. He is in complete charge of the hatch.

Q. Where is he stationed?

A. He could be on topsides, he can be on the dock. He has complete charge of the men as far as keeping them working.

Q. Does he ever get down into the hatch?

A. He goes down into the hatch, certainly.

. . . . . .

Hession—redirect:

. . . . . .

Q. Whose job was it to decide whether cargo should be lifted up again or hoisted again once it was lowered into the hold?

A. That is either the header down into the hold—There [fol. 46] is a header or hatch boss, if he was down there. If the hatch boss is there he supersedes everybody in the hatch.

Q. He would give orders?

A. He would give orders to the signalman, that is right.

Q. To the signalman. The signalman in turn would tell the winchman?

A. That is right.

Q. As to whether or not an attempt should be made to put the cargo in place or to take it up again, who would decide that question?

A. The hatch boss would decide that because he has already been informed by the pier officer or the Army officer where the package is to go.

. . . . . .

By the Court:

Q. Might there have been a locking device and in the course of the operation of the winch the locking device came loose?

A. There was never a locking device put on that beam in the shipyard.

Q. You could tell that?

A. Yes, sir. There was no marks of any lug ever being on the beam.

. . . . . .

FRANCISCO J. L'LANSO, called as a witness on behalf of respondents United States of America, et al., being first duly sworn, testified as follows:

Direct examination.

By Mr. Fanning:

Q. Mr. L'lanso, you are an officer in the United States Navy or Naval Reserve?

A. Yes.

Q. In September of 1942 what rank did you hold?

A. Lieutenant.

[fol. 47] Q. What rank do you now hold?

A. Lieutenant commander.

Q. In September of 1942 to what vessel were you attached?

A. U. S. S. Thomas Stone.

Q. In what capacity?

A. First lieutenant and damage control officer.

Q. Prior to your service on the Stone had you had some other sea service?

A. I had.

Q. How long have you been going to sea altogether?

A. 14 years.

Q. Before joining the Stone what vessel were you in?

A. On the S. S. President Van Buren.

Q. And that was originally the name of the U. S. S. Thomas Stone?

A. Correct.

Q. About when was she built?

A. She was commissioned in September of 1941.

Q. Were you in her at that time?

A. I was.

Q. And remained in her how long?

A. Until July, 1943.

Q. When did you go in her in that time? I mean while she was the President Van Buren what voyage did you make in her?

A. Around-the-world voyage.

. . . . . .

Q. Were you in the vessel from the time she was put in commission as the President Van Buren until she went out of commission sometime following this accident?

A. I was.

Q. In what capacity were you in the President Van Buren?

A. Chief Officer.

Q. Mr. L'lanso, I just want to ask you a couple of questions about this plan, which I have put up on the stand here and which is marked "Hold"; do you recognize it as being [fol. 48] a plan of the hold of the Thomas Stone?

A. I do.

Q. And it is which hold?

A. No. 1.

Q. Lower hold?

A. Yes, No. 1 lower hold.

Q. In No. 1 there were how many decks?

A. There was a second deck, first platform, second platform, third platform and lower hold—four decks below the main deck.

Q. Will you indicate here what portion of the lower hold was available for cargo?

A. From Frame 45 forward to Frame 42.

Q. What is that frame 45?

A. That is the forward quarter of No. 2 lower hold.

Q. Is there some sort of a bulkhead there?

A. Yes, there is.

Q. Is it a solid affair?

A. It is a complete transverse bulkhead.

Q. At the very forward end of the hold what is there?

A. It is storage for ammunition.

Q. What is it made of?

A. Steel.

Q. The after end of the ammunition locker is where with reference to the forward coaming of the hatch?

A. Flush with it, even with it.

Q. And the ammunition locker then extends to where?

A. Up to frame 23.

Q. Is there any dividing structure in the square of the hatch under the hatch opening in the lower hold?

A. No, there is not.

Q. What is there in the after end of the hatch opening by way of partition, stanchion or other permanent structure?

A. You have a non-watertight fore and aft bulkhead of steel extending from frame 45 to the after coaming of the hatch.

[fol. 49] Q. Now, that starts at about under the after coaming of the No. 3 platform opening?

A. Yes.

Q. Is there at that point other permanent structure, stanchion or whatnot?

A. There is a pillar or stanchion at that point.

Q. Approximately what are the dimensions of that and where does it extend to? First, can you point it out to us?

A. It is T-shape and about 2 feet long by a foot and three-quarters wide.

Q. From what point to what point does it extend?

A. From the lower hold to the deckhead, that is to say, the under part or under side of the third platform deck.

Q. What activities was this vessel engaged in in the summer of 1942 prior to the happenings of this accident?

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A. She was on training operations involving amphibious landings.

Q. What did you in your capacity have to do with those operations?

A. I was responsible for the loading and discharging, the embarkation and debarkation of Army equipment and troops, and the handling of all weights on board the ship.

Q. And in that connection were any vehicles handled in or out of No. 1 hold?

A. There were.

Q. What type of vehicles were they?

• • • • • • •

A. The vehicles ranged from small trailers to, I think it was, ½ ton command cars.

Q. Was that under your observation?

A. It was.

• • • • • • •

[fol. 50] Q. How were they gotten in and out of the hold, No. 1 hold?

A. By means of the ship's cargo handling gear.

Q. During these maneuvers when they were taken out, where were they put?

A. Into boats alongside.

Q. After the maneuver of a particular practice was completed, what was done with the vehicles?

A. Reloaded into the ship.

Q. Who did that on board the ship?
A. The ship's crew.
Q. With what gear?
A. The ship's gear.
Q. How many of these practices were made during the summer of 1942?
A. Four or five.
Q. And you were on board on all of those occasions?
A. I was.

• • • • • • •

Q. You have been here since the case opened, have you not?
A. I have.
Q. And have heard all the witnesses who testified?
A. I have.
Q. Now directing your attention to the forward beam in the third platform deck about which we have had a good deal of testimony, you heard various witnesses say there was no locking device on the beam; can you tell us from your observation whether or not there was any locking device on the beam?
A. I do not remember whether or not on that particular beam there was a locking device.
Q. In your experience in the various vessels what do you say as to the presence or absence of locking devices on hatch beams such as this, how frequently do you see them?

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[fol. 51] A. I do not think I can assign a percentage of frequency of ships with locking devices on their hatch beams as compared with ships without locking devices on their hatch beams, but I have seen both arrangements in hatch beams, with and without locking devices.
Q. Assume for the purpose of this question, Mr. L'lanso, that this beam did not have a locking device; assume that the longshoremen were handling a vehicle at least 15 feet in length and that it became desirable after it had been lowered into the lower hold to raise it; in the event that such an operation might result in the unshipping of the beam, what in your opinion was the proper course to adopt with reference to the beam?

• • • • • • •

Q. Assume that some Army officer told the longshoremen to leave the beams in there and not to take them off; with those facts in mind, what in your opinion should have been done to see that the beam was secured?

A. Secure it with some means at hand.

Q. In what manner could it be secured?

The Court: For instance?

The Witness: Well, for instance, your Honor, you would have used a rope sling, putting one end through one of the lifting holes in the beam, which lifting holes have to be installed or cut into a beam so that ordinary beam slings can lift the beam in and out of the sockets—a rope sling through that lifting hole, down under the hatch coaming running outward or towards the side of the ship, and then that selfsame sling fastened onto any projection in the overhead or down on the ceiling itself, which is underfoot, [fol. 52] to whatever projection there is there.

* * * * * * *

The Court: I will allow it. You may proceed.

Q. What is there in the ceiling of the vessel on either side of the fore and aft athwartship coaming, in the ceiling of the lower hold by way of beams or other structures?

A. In the ceiling of No. 1 hold the ceiling itself had been cut away in spots, and U-bolts made of 1-inch round iron into the form of U's had been welded on the tank tops, or tank top itself, for the purpose of securing down firmly wheeled vehicles, wheeled cargo or vehicles that might be stowed in No. 1 hold.

Q. In the deck above what was there of that nature, if anything?

A. You had heavy overhead transverse beams, deck beams, supporting the third platform deck, which had lightning holes cut into them.

Q. From where to where did those beams extend?

A. From the hatch coaming to the ship's skin.

Q. Roughly how many beams of that character were there?

A. I think there were two in that hold.

Q. What was the situation in that respect on the other side, or was that the same situation on both sides?

A. It was similar.

Q. This hole that you speak of in the hatch beam, where is that with reference to the end or middle or wherever it may be?

A. It is near the end of the beam. I should judge about 6 inches towards the center from the end.

Q. How large a hole is it? Give it to us in inches.

A. About 4 inches wide and 2 inches deep.

• • • • • • •

[fol. 53] Q. Will you describe what you would consider an adequate means of securing a beam such as that without a locking device?

A. I would obtain a rope sling which is about 20 feet long, two pieces of manila line, and this line, because the ends are joined like a loop, I would put one end through the lifting hole in the end of the beam, bring the other end of the sling through that loop and tighten it down hard. Then I would take the other end of the sling, make it fast to a U-bolt on deck, or, if that was in the way for the subsequent loading of cargo, take it under the coaming of the hatch, lead it outboard, pass the end through one of the lightning holes in the overhead deck beam, pull the sling as tightly as I could manually with about two half hitches or knots on the end of it, take a piece of dunnage, or wood upon which cargo rests to keep it from chafing, and twist these two parts of the sling with the idea of tightening the sling, and then lifting one end of the piece of dunnage that was used to make this Spanish windlass and let it jam up against the overhead to keep the strain on that sling.

Q. How long would you think that operation would take?

A. Approximately five minutes.

Q. And whether or not in your opinion that would adequately prevent the beam from being unshipped?

A. I do think so.

Q. Did you observe whether or not there were any such slings about this hatch or about the ship on the day of the accident when you were there?

A. I don't remember that.

• • • • • • •

Q. Are such slings a common part of a longshoreman's gear?

A. Always.

[fol. 54] Q. How frequently are they used by longshoremen in connection with the loading and discharging of cargo?

A. Whenever the parcels of cargo are of such shape as to make them more easy of discharge with such slings.

. . . . . .

L'lanso—redirect:

. . . . . .

Q. By the way, what lead would that have, downward or upward?

A. It would have a downward lead restricted by the depth of the coaming itself. In other words, it would not lead any further down than the bottom edge of the coaming, except for the natural diameter of the rope itself.

Q. And then from the bottom of the coaming where would it lead?

A. It would lead back up again to the overhead, to this heavy deck beam which had lightning holes cut into it.

Q. Assume that that sling were made taut with this piece of wood which you described, in which direction would the pressure be exerted on that beam?

. . . . . .

JOHN S. GILLESPIE, called as a witness on behalf of respondents United States of America, et al., being duly sworn, testified as follows:

Direct examination.

By Mr. Fanning:

Q. Mr. Gillespie, you were a member of the crew of the U. S. S. Thomas Stone in September 1942?

A. I was.

Q. You are a commissioned officer in the Naval Reserve?

A. I was.

[fol. 55] Q. You were commissioned as what?

A. Lieutenant junior grade.

Q. She was a Navy transport?

A. She was.

Q. With an entire Navy crew?

A. She was.

Q. Prior to joining her had you had some sea experience?

A. I had.

Q. What service had you been in?

A. In the Merchant Marine.

Q. For how long?

A. About nine years.

Mr. Rassner: I will concede his qualifications.

Q. You hold a master's license in the Merchant Marine?

A. I do.

Q. What was your particular job on the Stone?

A. First division officer and deck watch officer.

Q. What in general did that require you to do on board of her?

A. I took care of the operation of the forward half of the ship as far as the crew was concerned, cleanliness and training of the crew, and stood watches at sea.

Q. Were you aboard of her during these practice maneuvers in the Summer of 1942?

A. I was.

Q. And what did your position aboard have to do with the putting in and taking vehicles out of No. 1 hold?

A. I had charge of that hold, that and two others.

Q. At any time during the maneuvers did that operation come under your observation?

A. At all times.

Q. And was it done night and day?

A. Mostly at night, but we did it in the daytime too.

Q. What sort of vehicle did you put in and take out of that hold?

A. Jeeps, command cars, ambulances and weapons carriers. The jeep is a quarter-ton vehicle and the others [fol. 56] are all half-ton, what they consider half-ton vehicles.

Q. In the lower hold was there a regular schedule of what was kept in there?

A. It varied. Sometimes they would put ambulances; maybe next time they would put command cars, or maybe they would put both in. It did not always remain the same.

Q. When she was loading for her African experience what went down into the lower hold?

A. There was one command car, one weapons carrier and a trailer, a two-wheeled trailer.

Q. What is the correct name for the command car?

A. It is a half-ton personnel carrier.

Q. And the weapons carrier is described accurately how?

A. It is a half-ton truck that carries both personnel and guns—machine guns and rifles.

Q. What equipment did you have in the No. 1 lower hold in September of 1942 for the purpose of handling whatever went in there?

A. We had automobile jacks the same as are used in commercial garages for moving the vehicles around by raising one end or the other a few inches off the floor and pushing the car into place.

Q. Generally what does such a jack look like?

* * * * * * *

A. It is a hydraulic affair.

Q. About how long is it?

A. The body of the jack is approximately 3½ feet long with four wheels, hydraulically operated. It has a handle 4 or 5 feet long.

Q. What other equipment did you have down there in connection with the cargo that was carried?

A. They had—for moving the cargo?

Q. No, I mean for handling it or securing it or any-

[fol. 57] thing connected——

A. Of course we had ringbolts welded to the tank tops with holes cut in the ceiling so you could get at them to secure the cargo, and we had ringbolts or C-clamps on the arms on the skin of the ship and on all bulkheads so that the vehicles could be secured to them, so that they would not move around when the ship was under way.

Q. What did that gear look like, was it rope or wire?

A. The clamps were of ⅞-inch still rings bolted on the frames of the ship any place you want them. They are movable. You just take a wrench and move them from one frame to another if necessary.

Q. Is there some wire attached?

A. We had ¾-inch and ½-inch wire down there to secure the bumpers of the trucks to the bulkheads, to these pad-eyes or C-clamps.

Q. You have been here ever since the case opened?

A. Yes.

Q. And you heard the testimony of all of those who have testified?

A. I have.

Q. This after bulkhead of the ammunition locker extends from where to where?

A. It extends almost to the skin of the ship on each from the tank tops up through the third side, although there was about a 2½-foot space on each side.

Q. Where with reference to the third platform deck?

A. It extends from the tank tops up through the third platform deck. There was one above. The third platform deck was welded to it.

Q. What use was made of the deck on the level above the lower hold?

A. Stowing vehicles and cargo.

Q. Were there any troop accommodations in there?

A. Not on the third platform.

Q. Where were the troop accommodations going from [fol. 58] the bottom up?

A. On the second platform. That would be the one above.

Q. The next above, the third?

A. Yes.

Q. Are you familiar with the beams, hatch covers and other gear that was used in the third platform deck?

A. Yes.

Q. Assuming, Mr. Gillespie, that a half-ton weapons carrier or command car was in the course of stowage in the lower hold, that the forward beam was in place, that the longshoremen had been told by an Army officer not to remove it, that the beam did not have any locking device, that it was contemplated that the vehicle would be raised after it had been dropped into the lower hold; what in your opinion was the reasonable and proper precaution to take in connection with the beam which had been left in place?

A. They could have secured the beam in place if they were afraid they would dislodge it.

Q. In what manner could it have been secured?

A. I would take a wire through the lifting hole in the beam, lead it through one of the lightning holes in the overhead beams in the ceiling of No. 3 platform deck, put two wire clamps on it, and make it just as taut, just as secure as there would be any possible way of securing it.

Q. The lifting hole is where with reference to the end of the beam?

A. 18 inches in from the end of the beam.

Q. When you attached your wire there where would you lead it?

A. I would lead it down underneath the hatch coaming, underside of the hatch coaming.

Q. Then in which direction?

A. Back up to the ceiling beams.

Q. After you had put a strain on that wire, in which direction would the pressure be on the beam?

A. Down.

[fol. 59] Q. Assuming that there was a similar device on the other side of the beam, what in your opinion would be the possibility of dislodging the beam when handling the vehicle I have described?

Mr. Ash: Objected to.

Q. Assume, Mr. Gillespie, that the beam was raised one foot from its position so that the spreader would engage in some part of the beam, what then?

A. Before the wire that is holding the beam would break I think the spreader would break on the car.

* * * * * * *

Direct examination continued by Mr. Fanning:

Q. Mr. Gillespie, what was the dimension of the coaming from the level of the third platform deck to the lower end of the coaming on the—I am referring to the athwartship coaming?

A. The coaming was the same depth all the way around, 30 inches.

Q. This gear which you described yesterday as being available and fit for lashing the beam, how many such wires and clamps did you have in No. 1 lower hold?

A. I do not recall the exact number, but there were 15 or 20 in the holds.

Q. Where were they kept?

A. They may have been left secured to the frames or may have been laying in a corner as they were used to secure the vehicles. They may have been all piled up on the third platform.

Q. Are you able to tell me how far below the top of the beam this lifting hole was? You said yesterday it was 18 inches in from the end of the beam; can you tell me how far from the top of the beam?

[fol. 60] A. The bottom of the hole would be roughly 6 inches from the top of the beam.

Q. And I ask you roughly the dimensions of the hole.

A. As I recall the hole was roughly 4 inches in length and 3 inches high.

Q. Assume, Mr. Gillespie, that this athwartship beam, forward athwartship beam at the third platform deck, had been left in place at the direction of some Army officer, that it did not have any locking device on the starboard side, that the longshoremen were attempting to stow a command car or weapons carrier; whether or not in your opinion that operation could be conducted with reasonably safe possibilities with the conditions such as they were?

. . . . . .

Q. Mr. Gillespie, you have been here all during the testimony of the various witnesses and you have heard them describe the manner in which they conducted themselves, what they did and what happened?

A. Yes.

Q. With a knowledge of what has gone before, your knowledge of the physical facts there and your assumption of the facts which I stated a few moments ago, whether or not in your opinion the operation of the stowing of that vehicle could have been conducted with reasonable safety?

A. It could, and did in several instances that I was present at, although I was not present at this particular one.

Q. You say it could have been conducted with reasonable safety; what in your opinion should have been done to bring about that result?

A. If the man in charge had made sure that the vehicle [fol. 61] and the spreaders were clear in all respects before he ordered it lifted, it would not have caught on anything.

Q. Was there any other precaution which in your opinion should have been taken?

A. As a general rule when we were handling the trucks we put two steadying lines, one forward and one aft, on it and had one or two men on each steadying line, and they were able to handle the truck, swing it from a distance away from the truck so that they did not have to be

right up against it, so that if there was an accident they would not be under it. They were able to stand 10 feet away and swing the truck as it rose or as it was lowered.

. . . . . .

Q. Do you recall when the work of discharging was completed?

A. Loading?

Q. I am sorry, the work of loading.

A. All the cargo was on board at 2 or 3 o'clock in the afternoon, as I recall it, and the stevedores stood by for another four or five hours to assist the troops on board and to bring their B bags on board, and they helped with some of the officers' luggage.

Q. When did you sail?

A. We sailed at 6 in the morning of the 26th.

Q. Of September, 1942?

A. Yes.

Q. Has the U. S. S. Thomas Stone been in the United States since that date?

A. No.

Q. Will it ever be?

A. No.

Q. Can you help us any on this lieutenant who was spoken of? Was there some lieutenant who you understood came from Washington who had something to do with the stowing of the cargo and the order in which it went in, and so forth?

A. There was an Army officer assigned to the ship. [fol. 62] I do not know where he came from, but he was assigned to the ship as a troop transport quartermaster.

Q. Do you know his name?

A. No, I do not recall his name.

Q. Whether or not he sailed with the vessel?

A. He did sail with the vessel.

Q. Where was he when you last saw him?

Mr. Rassner. I object to that. It does not make any difference. He has been assigned to the ship. He becomes part of the personnel.

Mr. Fanning: Are you going to comment on my failure to produce him?

Mr. Rassner: No, it does not make any difference. He became part of the personnel once he was assigned.

Q. I forgot this. This accident was called to your attion on the day it happened?

A. No, the following morning. I was not aboard at the time of the accident.

Q. Had you been down in No. 1 hold at any time before the accident while you were connected with the vessel?

A. Frequently.

Q. Can you tell us whether or not there were any locking devices? Was this forward beam on the third platform deck equipped with a locking device?

A. It was not.

Q. How about the other beams in the same hatch?

A. They were not either.

Cross-examination.

By Mr. Rassner:

Q. You say the Army officer was assigned to the ves-[fol. 63] sel and became part of the personnel of the vessel and went with it?

A. He was transported along with the rest of the troops. He was laison officer between the Navy and the Army in respect to the stowage of the cargo. He gave us the priorities on the cargo in respect to the time they were to come out of the ship.

* * * * * * *

Q. The duties of this lieutenant were to take charge of the vessel insofar as the loading operation was concerned, isn't that so?

A. I can explain that.

Q. I wish you would explain it in your own way. What was the setup?

A. We did not have stevedores loading the ship. In other words, when the ship's crew handled the cargo, which was 90 per cent of the time, the troop transport quartermaster's job was to tell us which vehicle was to go in and come out first. In other words, if there were 10 vehicles to be put in a hold he told us which vehicle to go down first and be put in a corner as that would be the last one out. The same thing if he wanted another vehicle out the first when we discharged he would tell us that that was to be the last one in so that it could be left in the square of the hatch. As to how

the cargo was handled that was none of his affair. It was only how it came out and went in.

Q. He was assigned to the ship, is that correct?

A. Yes.

Q. You have information upon which you base that statement; haven't you?

A. Yes.

Q. You did not just guess about it?

A. No.

Q. What is that you base your statement on that this Army officer was assigned to the ship?

A. In all our operations where we did not have stevedores, [fol. 64] and I think the ones including the stevedores, he worked out with Mr. L'lanso, or it was worked out beforehand and handed to Mr. L'lanso the priority of the vehicles and the cargo, how it was to be stowed.

Q. Do I understand correctly that it was Mr. L'lanso who gave directions to the Army officer?

A. No, the Army officer told Mr. L'lanso the priority of the vehicles and the cargo.

Q. What was the reason for taking it up with Mr. L'lanso?

A. He was in charge of all cargo handled on the ship.

Q. Mr. L'lanso?

A. Yes.

Q. And so anything that the lieutenant wanted done would have to be done with the consent and permission of Mr. L'lanso, isn't that right?

A. That is right.

Q. And Mr. L'lanso was his superior?

A. Well, he was superior in rank, but Mr. L'lanso had to abide by whatever the Army wanted.

Q. Those were suggestions by the Army which were taken up with the man in charge of the vessel?

A. The only time that Mr. L'lanso had any right to contradict the way that the cargo would be coming into the ship would be if it endangered the stability of the ship.

Q. The Army officer could do nothing without the consent of Mr. L'lanso, isn't that right?

A. I am talking about the time——

Q. No, take it this way, the way I have given it to you, and answer me: Isn't it so that the Army officer when assigned to the ship is assigned because of his special knowledge or training for that purpose, and he suggests to Mr. L'lanso

what is to be done and Mr. L'lanso has to give him permission to do it before he can do it, isn't that so, isn't that the setup?

[fol. 65] A. No, he is assigned to the ship to make sure that the Army gets their cargo in in the right order to get it out of the ship in the right order.

Q. In order to carry out those thoughts he has to take it up with Mr. L'lanso?

A. That is right.

Q. And he has to get the approval of Mr. L'lanso?

A. That is right, as far as the stability of the ship is concerned.

Q. That all has to be done with Mr. L'lanso's consent and under his general supervision, isn't that so?

A. That is right.

Q. So that the Army officer's superior on that particular ship, the man that he has to get his orders from, is, or in than instance was, Mr. L'lanso, isn't that so?

A. He is superior in that particular job of priorities.

Q. Of Mr. L'lanso, isn't that right?

A. Yes.

* * * * * * *

Q. You knew that the locking device was absent?

A. There was never one on the beam.

Q. That none had ever been put on the beam?

A. It was never intended to put one on.

Q. What the intentions are you would not know, would you? You cannot read the mind of the builder?

A. Well, I was in the shipyard when they converted the ship.

Q. Isn't it a fact that there was no locking device on that beam at any time, including the time of the accident, isn't that true?

A. There was no locking device.

Cross examination

By Mr. Ash:

Q. You said that it was never intended that there was to [fol. 66] be a locking device on this beam?

A. There was no hole in the beam for it.

Q. I understood you to say that it was never intended that there be a locking device on this beam.

Mr. Fanning: Intended by whom?

The Witness: There was not any on the plans.

Q. Are you sure?

A. I looked at the plans of that particular hold, of that particular platform deck.

* * * * * * *

Mr. Fanning: I read the deposition of Santo DiMare, taken at Wilmington, North Carolina, June 6, 1944, at which the libellant, respondent and respondent impleaded were present. It was taken at the instance of the United States. The appearances were as follows: On behalf of the United States, Mr. Thomas H. Walker; on behalf of the libellant, Mr. Ernest Rassner, and on behalf of the American Stevedores, Inc., Mr. George Rountree.

(The following excerpts of the deposition were thereupon read to the Court):

"Q. Mr. DiMare, you are stationed at Kure Beach, North Carolina, in the Coast Artillery, aren't you?

"A. Yes, sir.

"Q. Up to December 1942 how many years had you worked as a longshoreman?

"A. Twelve years.

"Q. And of that twelve years had you worked any as a hatch boss?

"A. Yes, I worked between three and four years as a hatch boss.

[fol. 67] "Q. That was the last three or four years that you worked as a hatch boss?

"A. I mean I worked along there twelve years—I worked nine years; two years—about twelve years all together.

"Q. Out of the twelve years you worked three or four years as hatch boss?

"A. Yes, sir.

"Q. During September 1942 by whom were you employed?

"A. American Stevedores.

"Q. What was your job?

"A. Loading transport ship, with American Stevedores.

"Q. That is American Stevedores, Inc. (Incorporated) —you worked for them as hatch boss?

"A. Yes, sir.

"Q. During the latter part of September 1942 did the American Stevedores, Inc., have the job of loading Navy transport at Pier No. 11, Staten Island?

"A. Yes, sir.

"Q. When you went aboard the Navy transport at Pier No. 11, Staten Island, what were you going to do? What hatch were you going to load?

"A. No. 1 hatch.

"Q. What was your job?

"A. Hatch boss at No. 1.

"Q. When you came aboard and went to No. 1 hatch, where were the hatch covers and the strongbacks?

"A. They were in place.

"Q. What did you proceed to do?

"A. Took the hatch off.

"Q. Whose job is it to decide how many hatch covers to take off?

"A. Up to me.

"Q. How many strongbacks did you take out?

"A. I took out two.

"Q. You mean two strongbacks out of each deck?

"A. Out of each deck.

"Q. Which two strongbacks did you take out?

"A. I took out the two strongbacks on the after end.

"Q. Which way did the strongbacks run in the hatch—[fol. 68] fore and aft, or athwartship?

"A. Ran from one side of the ship to the other.

"Q. Then I take it that you took out the two beams nearest the stern of the ship—you removed the two beams nearest the stern of the ship?

"A. I removed the two after strongbacks, together with the hatch covers, and placed them on top of the forward strongback and hatch covers, which were left in place.

"Q. Did you inspect the strongbacks which were left in place?

"A. Yes, sir.

"Then did you proceed to load, or what did you proceed to do?

"A. We first removed the two after strongbacks in each deck and placed them on the strongback which was left in place in each deck.

"Q. You then started to load the ship?

"A. Yes, sir.

"Q. What were you loading?
"A. Canned goods.
"Q. What time did you start to work?
"A. Seven o'clock at night.
"Q. How long did you continue to load?
"A. Until twelve, midnight.
"Q. Did you have any trouble in loading that night?
"A. No, sir.
"Q. Winches working all right?
"A. Yes, sir.
"Q. When did you start loading again?
"A. Eight o'clock the next morning.
"Q. Did you continue to load right through that day?
"A. Sure, we worked all day, beside we stopped for lunch.
"Q. What were you loading that morning?
"A. We were loading canned goods.
"Q. Later in the morning, did you load something else, some time about eleven o'clock?
"A. I don't know if it was eleven o'clock, we started loading some trucks.
"Q. You started loading one truck?
"A. Yes, sir; one truck we got in the hold.
[fol. 69] "Q. Where did you put that truck?
"A. On the left side; on the side of the dock.
"Q. Then you put it in the left wing?
"A. In the left wing.
"Q. Did you load that without any difficulty?
"A. Yes, sir, without any difficulty.
"Q. What did you do after that?
"A. We started to load the other truck.
"Q. Another truck?
"A. Another truck.
"Q. Did you lower it to the hold all right?
"A. Which one? The other side?
"Q. Did you lower it to the hold?
"A. Yes, sir. We just put it down to the square of the hatch.
"Q. Where were you going to put that truck?
"A. On the right side; in the right or starboard.
"Q. In what part of the wing?
"A. In the after part of the starboard wing.
"Q. I believe you said you lowered it down to the square of the hatch, or the middle of the hatch, and let it rest on the bottom of the hold—then what did you do?

"A. The truck was standing right in the square of the hatch. I told them to tell the winchman to pick it up a little bit because we were going to put it in the after starboard wing.

"Q. Did they tell him to pick it up?

"A. Yes, one of the men.

"Q. What did he say?

"A. 'Pick it up a little bit.'

"Q. Did the winchman pick it up a little bit?

"A. Not the first time.

"Q. Who was the up-and-down winchman?

"A. An Italian whom we called 'Patsy'.

"Q. Who had the Burton Winch?

"A. A man by the name of Dominick.

[fol. 70] "Q. When the winchman did not pick the truck up the first time, what did you do?

"A. I repeated the command to the man to tell the winchman to pick up the truck.

"Q. What did the man tell the winchman?

"A. He told him to pick up the truck.

"Q. What did he say?

"A. 'Pick it up a little bit'.

"Q. Did the winchman pick up the truck?

"A. He picked it up, not so fast, the minute the gangwayman told him to pick it up; all at once; I don't know how they did it. All at once I saw the hatch beam and covers all down in the hold.

"Q. Just before they picked up the truck where were you standing?

"A. I was standing on the after side of the hatch, with my hands on the fender of the truck.

"Q. Which fender was it; the right or left fender?

"A. On the left front fender.

"Q. How far back from the after side of the hatch were the canned goods stored?

A. "About three feet.

"Q. How far from the canned goods which were stowed underneath the platform deck on the after side was the forward end of the truck?

"A. The truck was right up against the canned goods which were stowed on the after side, about three feet back from the edge of the hatch.

"Q. Which way was the truck standing?

"A. The truck was standing fore and aft, with the motor part of the truck pointing toward the back of the ship and the back end of the truck pointing to the forward part of the ship.

"Q. Before they raised the truck where were your men standing?

"A. They were standing on each side; four men on each side of the truck.

"Q. Four men were on the righthand side and four men on the left side?

A. "Yes, sir.

[fol. 71] "Q. Did I understand you to say that when the winchman started to raise the truck the hatch beams and hatch covers all fell down into the hold?

"A. Yes, sir.

"Q. Where was Rosario Porello standing just before the strongbacks and hatch covers fell into the hold?

"A. He was standing on the righthand side of the ship which would be the lefthand side of the truck.

"Q. After the hatch beams and hatch covers fell into the hold, where did you find Porello?

"A. I found him underneath one of the strongbacks.

"Q. Was this strongback lying completely on the deck?

"A. No, sir. One end of the strongback was resting on the deck of the lower hold and the other end of the strongback was still resting on the side of No. 3 platform deck.

"Q. How was Porello lying or resting under the beam?

"A. He was underneath.

"Q. How was he underneath?

"A. He was on his hands and knees underneath the beam with the beam resting on his shoulder. (Witness illustrated by getting on all-fours.)

"Q. Did you say that you removed Porello out of the hatch?

"A. I put Porello on platform and had him hoisted and placed on the dock.

"Q. Was anybody else hurt?

"A. There were three guys; two besides Porello.

"Q. Up to the time the hatch covers fell in had you had any trouble loading?

"A. No, sir.

"Q. Had you had any trouble with the winches?

"A. I don't think so.

"Q. Had anybody complained?

"A. I don't remember it if anybody came up and told me. I don't remember.

"Q. Did you complain to anybody about the winches?

"A. No sir.

[fol. 72] "Q. After you put Porello ashore, what did you do with the strongbacks and the hatch covers which fell into the hold?

"A. We put them in place again.

"Q. Same place and same position as they were before they fell?

"A. Yes, sir.

"Q. You put the strongbacks and hatch boards back in the same place where they were before, is that right?

"A. Yes, sir.

"Q. Then what did you do?

"A. We started to load again.

"Q. For how many days did you load after that?

"A. About two days I think.

"Q. Did you have any more trouble loading after that?

"A. No, sir.

"Q. Did you load some trucks after that?

"A. We loaded several trucks and canned goods again.

"Q. Same cargo—more trucks and more canned goods?

"A. Yes, sir.

"Q. You loaded them without any difficulty?

"A. Yes, sir.

"Q. Did you have any trouble with the winches during that time?

"A. No, sir.

"Q. You didn't complain to anybody about the winches at any time, did you?

"A. No, sir.

"Q. How are those strongbacks fastened on the square of the hatch? How are they secured? Are they put on tight, or loosely?

"A. In place.

"Q. Are they fastened?

"A. Yes, sir.

"Q. What are they fastened with?

"A. On the side of the hatch is a lock and it goes right inside.

"Q. When you take hatch cover off you have to take that hatch lock off before you take it up, is that right?

"A. Yes, sir.

"Q. Are they pulled in place?

"A. One was broken.

[fol. 73] "Q. Which one was broken?

"A. The one on the right side.

"Q. Is that the one that fell down?

"A. Yes, sir.

"Q. Was the beam not loose? Was it knocked off? Did you see the bridle?

"A. I didn't see the bridle.

"Q. When you ordered the truck to be lifted up the second time, was the truck lifted up slowly or fast?

"A. Not slow, and not fast; just jumped up a little.

"Q. How high did it jump up?

"A. About one foot from the bottom of the lower hold.

"Q. Do you know what caused the beam to fall, if you know?

"A. Yes. The lock was not in place. The beam has two locks; one lock was broken, if this corner had a lock.

"Q. Was this one of the beams that you removed that fell?

"A. No; that one was in place.

"Q. Did you remove that beam?

"A. No, sir.

"Q. Is that the one that struck Porello?

"A. Yes, sir.

"Q. Did the hatch boards fall with the beam?

"A. Yes, sir.

"Q. How many?

"A. There were a lot of hatch boards down there.

"Q. Four men were on one side of the truck and four on the other, and he was in the front of the truck?

"A. Yes, sir.

"Q. What were they doing at the time?

"A. What were they?

"Q. Just before the beam fell.

"A. They were standing around doing nothing, holding truck; they were waiting for my orders.

"Q. Can the winchman see down in the hold?

"A. Yes, sir.

[fol. 74] "Q. The winchman can look down in the hold?

"A. Yes, sir.

"Q. Who gives the orders? The man in the hold or the gangwayman on top deck?

"A. The orders are given the man down in the hold. He is supposed to give it to the gangwayman, because the winchman can see down in the hold."

"Q. And I believe you said that at the time you took the two hatch beams out of each deck you inspected the remaining hatch beam or hatch beams in each deck.

"A. Yes, sir.

"Q. And at the time you took the hatch beams out of the lower platform or the deck immediately above the lower hold you examined the remaining hatch beam or hatch beams in that deck?

"A. Yes, sir.

"Q. And you saw that this lock device was bursted?

"A. It was missing.

"Q. Was missing at that time?

"A. Yes, sir.

"Q. And that was before you started to load any cargo?

"A. Yes, sir.

"Q. Did you call their attention to the fact that the locking device was missing?

A. No, sir. I did not call their attention."

GEORGE T. BREW, called as a witness on behalf of respondents United States of America, et al., being first duly sworn, testified as follows:

Direct examination.

By Mr. Fanning:

Q. What is your business?

A. A supervising stevedore.

[fol. 75] Q. By whom are you employed?

A. The United Fruit Company.

Q. How long have you been connected with the loading and discharging of vessels?

A. Since 1916.

Q. In what capacities have you been so connected?

A. I worked in the hatch as a member of the gang during 1916.

Mr. Rassner: I will concede Mr. Brew's qualifications.

Mr. Fanning: I have particular reason for wishing some of them.

Mr. Rassner: I happen to know Mr. Brew and I will concede he knows his business.

Q. Go ahead, Mr. Brew.

A. In 1919 after leaving the Army I went working as a longshoreman again. Later on in the year 1919 I became a hatch boss. In 1920 I was promoted to stevedore in charge of a ship, in which capacity I have been ever since; and I have been contracting stevedore for the Atlantic Coast Shipping Company from 1919 to 1927, and from 1927 as supervising stevedore for the United Fruit Company.

Q. Have you recently been in the Army?

A. Yes.

Q. In what capacity?

A. As a major in the Transportation Corps.

Q. And in connection with your duties in the Army did you have anything to do with loading or discharging motor vehicles from ships?

A. I did, yes.

Q. Will you describe just what you had to do in that connection?

Mr. Rassner: I object to that. I have conceded his qualifications. We are going off on a tangent as to what he did on other ships.

[fol. 76] The Court: He wants to show the type of his qualifications, I can see that, but I think you have gone far enough.

Q. You have heard the testimony of Lieutenant Commander L'lanso and Mr. Gillespie, and you just heard the deposition of one, Mr. De Mare, read. You have been in court all during that time?

A. Yes.

Q. How much experience have you had on the general work of loading and discharging motor vehicles in and out of ships?

A. I have handled many thousands of them.

Q. When did you get out of the Army?

A. On the 24th of October I was placed on inactive status.

Q. I want you to assume these facts which I will repeat as being the facts upon which I shall ask you to base an opinion: Assume that the No. 1 hatch of the U. S. S. Thomas Stone has four decks, the lowest one being called

the third platform deck; that it was approximately 43 feet from the main deck to the lower hold; that the after hatch beam and covers were removed at each deck and the forward beams and covers left in place at the direction of an Army officer; that at the third platform deck the after hatch covers and beam were placed on top of the forward covers; that the forward beam at the third platform deck was 19 feet 11½ inches long, about 21 inches deep, weighed about a ton and was set in the slots in the coaming about 10 inches to a foot deep; that the beam did not have a locking device on the starboard end and was not lashed in place; that the opening at the third platform deck was about 10 feet 5 inches fore and aft and about 20 feet wide; that the longshoremen were engaged in loading a vehicle about 15 feet 9 inches long, 6 feet 3 inches wide and about [fol. 77] 5 feet 3 inches high by means of a sling which passed under the front wheels and one which passed under the rear wheels, each sling having a wooden spreader which extended above each set of wheels and about a foot outside each side of the vehicle; that the vehicle had been lowered athwartship to about a foot above the deck of the lower hold; that cases of canned goods had been stowed in the after part of the lower hold forward to a point about under the after coaming at the third platform deck and extended to the side of the ship; that there was a munition bulkhead at the forward end of the hold that extended almost the complete width of the ship; and assume the overhead girders existed as described by Lieutenant Commander L'lanso and Mr. Gillespie, and that there was in No. 1 lower hold the equipment and gear described by Mr. Gillespie; whether or not in your opinion, Mr. Brew, the vehicle could be stowed with reasonable safety under those circumstances?

Mr. Rassner: I would like to enter an objection here on the ground that under no circumstances can the ship delegate away responsibility to provide a reasonably safe place for the stevedore to work, and therefore this question is entirely irrelevant, incompetent and immaterial.

The Court: The objection is overruled. You may answer.

A. Yes, it could be safely done.

Q. Will you describe the method which in your opinion would accomplish it in a reasonably safe manner?

Mr. Rassner: I object to that on the same ground.

[fol. 78] The Court: The objection is overruled.

Mr. Rassner: Exception.

A. I would like to ask counsel one question, where they had determined on stowing that vehicle?

Q. I would like you to assume on the facts that I have given you the stowage of it in any place where it would go.

A. The vehicle could be lowered into the hold athwartships, that is, with the forward end facing one side and, naturally, the aft end facing towards the other side, athwartships down to take advantage of the full width of the hatch on its greatest measurement, lowered right to the hold with perfect safety.

Q. Assuming it is hanging on the end of a sling and is about a foot from the tank top or tank top cover, and it becomes necessary or desirable to raise it, what in your opinion would be the proper method of doing it, and what if any precautions in your opinion should be taken?

A. The vehicle should be still athwartships, still out into the existing square of the hatch, which is of the measurement 10 foot by roughly 20 foot, with everything being properly clear, the spreaders included, clear of the beam or the underside of the coaming on the after side.

Q. To change the facts slightly, assume that the vehicle had been so moved as to bring it, or a part of the spreader, under the beams; under those circumstances what in your opinion are the precautions which should be taken before the vehicle is raised?

Mr. Rassner: I object to that as a hypothetical question which does not accurately state the facts.

The Court: The objection is overruled.

A. The common practice when there is any necessity [fol. 79] for work of that nature where there would be a part under a beam, is to ascertain whether or not the beam is fast and cannot be unshipped.

Q. If in the course of loading such a vehicle there was a possibility that it might be required to be raised, what in your opinion was the proper precaution to be taken with reference to the securing of the beam?

A. The foreman, having cognizant of the fact that there was no pull on the beam, should have made the beam fast in its socket.

Mr. Ash: I move to strike that out. That was not incorporated in the question and is a voluntary statement and an assumption by the witness.

By the Court:

Q. You say the foreman; you mean the hatch boss of No. 1?

A. Yes.

Q. Mr. Brew, when you said the foreman being cognizant of the fact that there was no locking device, whatever it might be, on the beam, did you refer to Di Mare, who was the boss of hatch No. 1?

A. Yes, he was in charge.

Q. What is he called, foreman or boss?

A. Hatch foreman.

The Court: I will allow it to stand, because Di Mare in his deposition said that he had observed the missing lock before they commenced to work. You may have an exception.

By Mr. Fanning:

Q. In the absence of any built-in locking device, what [fol. 80] method in your opinion was a desirable one to follow in securing the beam, assuming you are going to leave it in and there is no built-in device on it?

A. Might I ask counsel the depth of the coaming below the bottom of the beam?

Q. The testimony has been 30 inches.

A. In that case with the hole in the beam, the simplest device would have been two hooks under the coaming set taut with rope, with two half-hitches made in the rope and it would have been perfectly safe, as the hooks would be under the coaming and the strain would be upwards. I think I went ahead of the question. I said two hooks on the side without the pull. This hook would have an upward strain naturally if all the slack had been taken.

The Court: You mean if there was no locking device there were other methods which should have been provided to keep it fast?

The Witness: Yes, sir.

Q. What other means in your opinion might have been used to make the beam secure?

The Court: That is sufficient.

A. There are several others.

Mr. Rassner: May I enter my objection to this line of testimony as being entirely incompetent, irrelevant and immaterial. The question is if there was a defect there how the defect could be remedied or removed. It does not make any difference otherwise. The question is, was there a [fol. 81] defect there or wasn't there and how it could have been remedied.

The Court: I quite agree with you if there is an inherent defect, but if one observes that there is an inherent defect and he knows that as a result of that it is dangerous, or if whoever was in charge felt that that was a dangerous condition and there would be ways of securing that defect, temporarily if nothing else, should not steps be taken to remedy the situation?

Mr. Rassner: The answer is yes, but might I call something else to your Honor's attention in view of the fact that this is not the average negligence case where that question would be of importance. This is an admiralty case where there is only one proximate cause and if we have established that the proximate cause was a defective device the other contributory causes as distinguished from the average negligence case have absolutely no bearing on the case. That is in line with the Sunset case.

The Court: There is a lot in what you say.

Mr. Rassner: And it is for that reason I make my objection. Of course, I will abide by your ruling but I would like to have the record protected.

The Court: Yes, you may have it protected. However, I want to take hold of that.

Isn't that true, Mr. Fanning?

Mr. Fanning: I offer this evidence because I am going to argue to your Honor that the last and best chance of seeing that this thing did not happen was in the stevedore. [fol. 82] The Court: I assumed that your argument would be the last chance.

Mr. Rassner: I simply wanted to get a ruling to protect the record and that is all.

The Court: Certainly, I will give it the weight that it is entitled to.

Mr. Ash: This is being offered as against the American Stevedores on the theory of the last clear chance. There is no suggestion in the petition of that as against us.

The Court: Maybe I am speaking a little too fast, but it appears to me at the moment that both of you are trying to pin it on one another.

Mr. Ash: No, I am in this position: Mr. Fanning has been very particular about the pleadings since the beginning. I came into this proceeding on a petition filed by the Government. If you will look at the petition, sir, you will find nothing to advise me that we assumed or took over any dangerous condition which we could have cured. The second paragraph of the petition says, "Your petitioner further alleges on information and belief that such injuries as the libelant sustained were de solely to the negligence if any negligence be established, of American Stevedores, Inc., the employer of the libelant, and the corporation which had contracted with your petitioner to load said vessel under written agreement dated July 24, 1942, providing in part as follows"; and then they quote from the contract, paragraph 10, "Your petitioner is informed and believes that the American Stevedores is a domestic corporation of the State of New York having its principal [fol. 83] place of business at 115 Liberty Street within this district, and was in charge of the operation of said winch and the loading of the vessel, and should be proceeded against herein and should be a party to this suit to complete the determination of the controversy." Now I do not believe that there is any allegation in there charging me with the fault that Mr. Fanning is now trying to adduce, nor is there any suggestion of the doctrine of the last clear chance or that we took over anything defective or anything along that line. He comes in and says, "It is solely your fault."

The Court: All right, let us look at it from a practical standpoint too, not just in a mere cold, bare way. It is visible from any standpoint that you are trying to pass the buck, in plain English, to Mr. Fanning is trying to pass the buck to you, and how much easier it would be if both of you were willing to carry that buck to a certain extent. Then the equity here would be easier for the Court to decide. If you did not get me, I will try to make it plainer.

Mr. Ash: No, I think it is very clear the thought that you are trying to express and get over to me, and I believe

I have received it. But the point I am making here, sir, is that a line of proof is now being offered against me of which I was not apprised nor brought into court upon.

Mr. Fanning: Of course, you were. You were charged with negligence. That is what I have been attempting to prove.

The Court: Look, Mr. Ash, as I said before, both of you [fol. 84] confine yourselves in a boat, and it is rocking, and both of you want to sit in it and you are trying to rock it over and you want to see who will go overboard first. That is the trouble.

Mr. Ash: I am willing to take a definite position on it, but some of my adversaries won't let me take a definite position on it.

The Court: You are not going to raise a surprise or anything like that, for if you are I will discount it. I mean I won't entertain it.

Mr. Ash: I say it is not admissible under his pleading.

The Court: Assuming that it is not, sitting in admiralty I am sitting as sort of a court of equity. In the absence of a jury I can take all that into consideration. I am not held down to the hard and fast rules of evidence. I don't think I am.

Mr. Ash: Oh, no, sir, you are not, and I would be the last person to urge that; but I do say this, I say that there is now being injected into this case a charge which was not injected by the pleadings under which I was not charged.

The Court: All right, give the Court some credit for being intellectual enough to sift it all out.

Mr. Ash: If I did not do that I would not have drawn it to your attention, but I think it is right to draw it to your attention and not be lulled into negative——

The Court: I shall try to do the best I know with what has come out. For the moment I believe I should let it in, because very likely I have let in a lot of other things. If [fol. 85] there was a jury sitting here I would not, and it gives me a clearer picture of the entire case.

Mr. Ash: The only way I could get this before your Honor at this time was to object. Now I anticipate that your Honor is going to take the proof because our courts want the proof in, because we have no new trial in admiralty, but I raise the point now so that your Honor will be cognizant of our position.

The Court: Did you say because you have no new trial in case I am reversed?

Mr. Ash: That is right, we do not come back here and retry it.

The Court: That is one thing, but I can be easily reversed if I do not get the point.

Mr. Ash: I would like to answer your Honor's question off the record.

The Court: Surely.

(Discussion.)

Mr. Rassner: May I have my exception now on the ground that there is only one proximate cause?

The Court: Certainly.

Q. (Read.)

A. The beam might have been made fast by passing a rope or wire from the hole in the beam down underneath the coaming and to the holes in the transverse floor support of the deck above, and made fast in a similar fashion by two half-hitches, and seizing a piece of rope yarn on to it so she would not pull loose. The thing should be well taut. Then he could take, if he had a beam clamp there he could take——

Mr. Ash: There is no evidence of a beam clamp.

[fol. 86] Mr. Fanning: Yes, there is.

Mr. Ash: He talked about a U-bolt.

Mr. Fanning: A U-bolt is a beam clamp.

A. (Continuing) He could take a sling from the hole in the beam leading down underneath the edge of the coaming over to the frame on the side of the ship, pass it through the ring in the beam clamp and make it fast.

Q. What in your opinion would be the effect of such apparatus on the security of the beam?

A. Absolutely secure if it was properly done.

Mr. Rassner: I have no cross examination.

The Court: Why don't you sit down then?

Mr. Rassner: I merely want to call it to your Honor's attention, but by that I do not mean to concede that I agree with the witness in his conclusion. I merely take the attitude that it is incompetent, irrelevant and immaterial.

Cross examination.

By Mr. Ash:

Q. Suppose you were in charge of this operation and you saw a beam with no locking catch device upon it?

A. Yes.

Q. Would you report it to the ship?

A. No, sir.

Q. You would not mention it to the ship?

A. You are asking me if I were the hatch boss?

Q. Yes.

A. I would immediately make that beam secure.

Q. I asked you if you would report it to an officer of the ship?

A. I would not take the trouble. It happens every day.

Q. What is the purpose of a lock catch, is it to hold the beam in place?

A. The purpose of a lock catch is purely something that [fol. 87] is put there by the builders of the ship. It is not mandatory by the United States Bureau of Navigation.

Q. Just a minute, you are not testifying here as the alter ego of the U. S. Local Board of Steamboat Inspectors?

A. No, sir, as a technical witness.

Q. Just answer the question, if we want the rules, we will get them, as to what they require. You would not report that condition to the ship, would you?

A. No, sir.

Q. Now I ask you to assume that with the knowledge that there was no lock catch the man in charge of the loading insisted that loading go on with that beam in place, would you say anything to him?

A. I hardly think I would. I would make the beam fast if I deemed it necessary on a straight loading job. It might not even be necessary.

Q. Then in your opinion there is not always a necessity to fasten a beam if it has not got a lock catch on it?

A. On a loading job it is not necessary. If there is no upward strain to unship the beam it is not necessary.

The Court: If there is no strain, you say. Wouldn't it jerk it up? Wouldn't it throw it up fast?

The Witness: Sir, if a draft became lost in the air and fell on that beam with tremendous force it is possible, very remotely possible, that the beam might buckle, but she would

never unship. It would have to be a force from underneath to pick her up.

Redirect examination

By Mr. Fanning:

Q. You mean forces going down entirely and not coming up?

A. Yes.

(Witness excused.)

[fol. 88] RESPONDENT'S EXHIBIT "G"

Extracts from Contract Between American Stevedores, Inc. and United States of America

This agreement, made and concluded in the City of New York, State of New York, this 17th day of July, 1942, by the United States of America, hereinafter called the Government, represented by the contracting officer executing this agreement, and American Stevedores, Inc., a corporation organized and existing under the laws of the State of New York hereinafter referred to as the Stevedore.

Witnesseth:

That for and in consideration of the mutual and dependent promises hereinafter set forth, the parties hereto agree as follows:

1. The Stevedore agrees to load cargoes and in connection therewith to perform all the duties of Stevedore on any vessel which the contracting officer or his agent may designate at Staten Island Piers, 11-17, both inclusive and Bush Terminal Piers, 1-7, both inclusive, at the Port of New York upon the terms and conditions hereinafter set forth for the terms beginning the 1st day of July, 1942, and ending June 30, 1943.

* * * * * * *

* * * The Stevedore shall, at its own cost and expense, rig and unrig all gear, rigging and equipment necessary for loading heavy lifts when handled by ship's gear.

The stevedore shall take off and put on all hatches, beams and tarpaulines; load, shift and lay all dunnage other than [fol. 89] flooring or shoring timbers for heavy lifts, except as provided in paragraph 9 hereof. The Stevedore shall also furnish and pay all winchmen.

. . . . . .

12. The Stevedore performing any service under this schedule shall be responsible for any and all damage or injury to persons and cargo while loading or otherwise handling or stowing the same, to any ship including its apparel and equipment, wharves, docks, lighters, elevators, cars, and car-floats used in connection therewith, through the negligence or fault of the Stevedore, his employees and servants.

13. The Stevedore shall at its own cost and expense carry the following insurance protection:

(a) Liability arising under Workmen's Compensation laws of the state in which the stevedoring is performed for injury to or death of employees, and also liability arising under the provisions of the Act of Congress approved March 4, 1927, entitled "Longshoremen's and Harbor Worker's Compensation Act" (Public #802).

(b) Liability to the public in the amount of $50,000.00 indemnity as respects bodily injury to or death of one person and subject to that limit for each person and in a total amount of $150,000.00 as respects bodily injury to or death of more than one person on account of any one accident.

. . . . . .

[fol. 90] RESPONDENT'S EXHIBIT M

U. S. S. Thomas Stone

Measurements

½ ton Weapons' Carrier
(Overall) 15' 11⅝" long, 7' 4⅛" high, 6' 3-13/16" wide. The height can be reduced to 5' 5⅛". Weight 4240 lbs.

½ ton Command Car
(Overall) 15' 9-13/16" long, 6' 11⅜" high, 6' 3-13/16" wide. Weight 5160 lbs. Height can be reduced to 5' 3⅜"

	Plan
Hatch Opening	
No. 3 Platform Deck—13′ 6″ fore & aft, 20′ 'thwartships	#157250
Hatch Covers	
Short Section—3′ 3″ x 17-1/16″ wide x 3¼″ thick	#157250
Long Section—10′ 7″ x 17-1/16″ wide x 3¼″ thick	#157250
Hatch Beams	
19′ 11½″ long, 21.14″ deep, 9.03″ across top	#108–15
Beam Ends 12″ deep	#108–15
Channel Stanchion—lower hold	
2′ 6″ wide	#160164
Vertical Ladder—lower hold	
1′ wide	
Port upright—6″ from center line of ship	#160164
Fore and Aft Bulkhead—lower hold	
15′ 6″ from after side of channel stanchion to 'thwartship bulkhead at frame #45	#160164
[fol. 91]	
Starboard side lower hold	
From the starboard upright of the vertical ladder to the starboard side of the ship 12′ 4½″	#160164
Tank Top Covering	
5″ Fir on tank top under hatch	#160164
Depth of No. 1 Hold	
43′ 7″—Main Deck—Plating to tank top covering	#157325 and #160164
Clearance underneath side of forward beam No. 3 platform deck to wooden tank top covering.	
Watertight bulkhead frame 32, 9′ 4″	#157195
'Tank Top Covering 5″	
plus Depth of forward beam 21.14 2′2″	
7′2″	#160164
Brow Piece—3rd Platform Deck	
3′ high x 12″	#108–15

[fol. 92] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

ROSARIO PORELLO, Libelant,

against

UNITED STATES OF AMERICA, Respondent,

and

AMERICAN STEVEDORES, INC., Respondent-Impleaded

APPEARANCES:

Jacob Rassner, Esq., Proctor for Libelant.

Hon. John F. X. McGohey, United States Attorney; Proctor for Respondent; Howard F. Fanning, Special Assistant, of Counsel.

Alexander & Ash, Esqs., Proctors for Respondent-Impleaded; Edward Ash, Esq., of Counsel.

OPINION OF MANDELBAUM, D. J.—Filed December 6, 1944

MANDELBAUM, D. J.:

The libelant is a longshoreman employed by the American Stevedores, Inc., the respondent-impleaded, and was injured on September 23rd, 1942, while engaged in loading [fol. 93] the vessel "U. S. S. Thomas Stone" owned by the respondent, United States.

During the course of this loading, the libelant working in hold #1 below the third platform deck of the aforesaid vessel was struck and severely injured by the falling of a strongback or 'thwartships beam used to help support the hatch covers. The injury occurred while a motor vehicle was being lowered into the hold. So that the vehicle could be stowed properly, it became necessary to slightly raise it, and the order to do so was given to the winchman by a foreman, Di Mare, employed by the American Stevedores, Inc., the impleaded respondent. There was some delay and the order was repeated. This time the vehicle came up with a quick movement hitting against the beam and dislodging it causing it to fall and strike the libelant who was stationed underneath it.

The beams used for the purpose are fitted into slots on each side of the hatch coaming and are equipped with locking devices at each end to prevent their falling. The

evidence discloses that the beam which fell only had one such device, and that the foreman, Di Mare, who was in charge of raising and lowering the materials and equipment was aware of the missing lock. There was no proof, however, that the foreman was aware that this condition was so inherently dangerous or that it was necessary to remove the beam prior to working at that hatch opening.

The libelant takes the position that the failure to supply the locking device on the beam by the respondent was negligence.

The respondent, United States, maintains that the primary negligence of the stevedore acting through its foreman caused the beam to fall, and that the failure on the part of the shipowner to supply the locking device on the beam [fol. 94] did not constitute such active negligence as to hold the ship liable. I cannot agree with this contention. Were it not for the fact that the beam was so unsecure, because of the missing locking device, I am of the opinion from the proof submitted, that the striking of the spreader bear or of the vehicle itself against the beam would not have caused it to fall. It is the duty of the shipowner to provide reasonable security against injury to stevedores employed to work on the ship. *The Etna,* 43 F. Supp. 303.

The negligence of the stevedore consisted in the careless handling of the cargo and the manner in which the foreman ordered the winch to operate, without making sure that the vehicle was clear of the beam. There is nothing to indicate that the winch was defective, and the libel claiming a defect in the winch has been amended to strike out that charge.

I must accordingly find that both respondent and respondent-impleaded are negligent.

The contention of the government that no jurisdiction exists in this matter for failure to come within the provisions of the Public Vessels Act (46 U. S. C. A. 471) has been disposed of in a previous motion in this matter by Judge Coxe, reported in 53 F. Supp. 569.

The hospital records indicate that libelant suffered a broken back. The injuries suffered by the libelant, according to expert testimony seem to permanently incapacitate him from performing further heavy manuel labor, but do not prevent him from doing other work of a less strenuous nature. This partial total disability may be estimated at 25%.

The libelant up to the time of the injury maintained [fol. 95] an average earning capacity of $1500 per annum. Libelant has a life expectancy of 18 years. Loss of earnings since the injury amount of $3,000; hospital expenses amount to $581.77.

As a result of his injury he will suffer a loss of approximately 25% of his average annual salary or $375. Capitalized at 2½% and allowing for exhaustion involved in occupations such as longshoremen where manual labor is required the present value of the income is $6,000. Together with pain and suffering to date of $1,000, pain and suffering he will incur in the future valued at $1,000, and the loss of earnings to date of $3,000, and hospital expenses of $581.77, his total damages amount to $11,581.77.

The libelant has accepted the sum of $1421.77 by way of compensation. I have already ruled at the trial of the action that the acceptance of such compensation in this case was not a bar to the recovery of a judgment. The sum received by the libelant shall be deducted by the American Stevedore Inc. who advanced the payments, from any payments to be made to libelant in satisfaction of the judgment herein.

A decree will accordingly be entered in favor of the libelant against both respondent and the respondent-impleaded in the sum of $11,581.77.

The following are the court's findings:

FINDINGS OF FACT

1. The respondent failed to provide a safe place for libelant to perform his work.

2. The 'thwartship's beam contained only one locking device and was therefore defective.

[fol. 96] 3. The stevedore, respondent-impleaded, through its foreman, negligently and carelessly handled the cargo in loading.

4. The injuries sustained by the libelant were a result of the negligence of both respondent and respondent-impleaded.

5. The libelant is suffering from a permanent partial disability.

6. The libelant did not accept compensation payments under an award of a deputy commissioner.

CONCLUSIONS OF LAW

1. The libelant did not accept compensation payments so as to preclude his bringing suit.

2. Respondent was negligent in not providing the libelant with a safe place to work.

3. Respondent-impleaded was negligent in improperly loading the cargo.

Dated, December 4th, 1944.

Samuel Mandelbaum, U. S. D. J.

[fol. 97] IN UNITED STATES DISTRICT COURT

AMENDMENT TO OPINION—Filed Dec. 21, 1944

MEMORANDUM

My opinion under date of December 4, 1944, is amended to the following extent:

Paragraph beginning with the words "A decree" and ending with the amount "$11,581.77," on page 5, is modified to read:

"A decree will accordingly be entered in favor of the libellant against United States of America for the full amount of libelant's damage $11,581.77. The decree shall provide that the United States of America shall have contribution from American Stevedores, Inc., respondent-impleaded, for one-half of the amount so paid."

Dated: December 18th, 1944.

Samuel Mandelbaum, U. S. D. J.

[fol. 98] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

Admiralty 127-36

ROSARIO PORELLO, Libelant,

against

UNITED STATES OF AMERICA, Respondent, and AMERICAN STEVEDORES, INC., Respondent-Impleaded.

FINAL DECREE

This cause having duly come on to be heard in its regular order on November 6, 8, 9 and 10, 1944, upon the pleadings

and proofs adduced by the respective parties and having been argued and submitted by the advocates of the respective parties, and the Court, after due deliberation, having rendered its opinion in writing finding both respondent, and respondent impleaded negligent and directing that the libelant recover from the respondent, United States of America, the damages sustained by it by reason of the matters and things set forth in the libel, and that the respondent, United States of America, have contribution from the respondent-impleaded, American Stevedores, Inc., for one half the total damages decreed, and having further directed [fol. 99] that the sum of $1,421.77 received by the libelant by way of compensation from the respondent-impleaded, American Stevedores, Inc. be deducted from any payments to be made to libelant in satisfaction of the judgment herein, and the costs of libelant having been taxed at the sum of $137.62,

Now, on motion of John F. X. McGohey, Proctor for the respondent, United States of America, it is

Ordered that the opinion of the Court, heretofore filed herein on the 6th day of December, 1944 together with the findings of fact and conclusions of law therein contained be and hereby is adopted as the Court's findings of fact and conclusions of law pursuant to Supreme Court Rule 46½; and it is further

Ordered, adjudged and decreed that the libelant, Rosario Porello recover of and from the respondent, United States of America, the sum of $11,581.77, the amount of the damages sustained by the libelant, together with the sum of $137.62, costs of the libelant as taxed, amounting in all to the sum of $11,719.39, less the sum of $1,421.77 heretofore paid to libelant, by way of compensation by respondent impleaded, American Stevedores, Inc., leaving a net balance of $10,297.62 and is further

Ordered, adjudged and decreed that the respondent, United States of America, recover from the respondent-impleaded, American Stevedores, Inc. one half the total damages decreed incluing costs, ie., one half of $11,719.39 or $5,859.70 less $1,421.77 leaving a net balance of $4,437.93.

Dated, New York, N. Y., December 19, 1944.

Samuel Mandelbaum, U. S. D. J.

[fol. 100] UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENTS OF ERROR—Filed March 16, 1945

United States of America, the respondent herein, hereby assigns error in the proceedings, findings of fact, conclusions of law and the decision and decree of the United States District Court for the Southern District of New York, in the above suit in the following particulars:

1. In ruling that the decision of Judge Coxe on this respondent's exceptive allegations determined the question of jurisdiction under the Public Vessels Act, 46 U. S. C. 781.

2. In failing to dismiss the libel for lack of jurisdiction.

[fol. 101] 3. In entering a decree against this respondent.

4. In ordering stricken from the answer of this respondent, the allegations with respect to the effect of the Longshoremen's and Harbor Worker's Compensation Act.

5. In finding and ruling that this respondent was negligent.

6. In finding and ruling that this respondent failed to furnish the libellant with a reasonably safe place in which to work.

7. In finding that it was necessary to raise the automobile in order to stow it properly.

8. In finding that beams such as that in use at the time of the accident are required to be equipped with locking devices at each end to prevent their falling.

9. In finding that beams such as that in use at the time of the accident are equipped with locking devices at each end to prevent their falling.

10. In finding that the absence of a locking device on the beam contributed to the happening of the accident.

11. In failing to find that American Stevedores, Inc., respondent impleaded, prior to the time loading commenced at No. 1 hatch, knew that the beam at the third platform deck, which was left in place, was not equipped with a locking device.

[fol. 102] 12. In failing to find that American Stevedores, Inc. neither secured the beam nor made any request of the officers of the ship to secure it.

13. In failing to find that American Stevedores, Inc., in raising the vehicle immediately prior to the time the beam was unshipped, was under the duty to see that the spreader and truck would clear the beam or if it would not that American Stevedores, Inc. was under a duty to secure it.

14. In finding that the beam which fell was equipped with a locking device at one end and not on the other end.

15. In finding that the beam which fell was defective.

16. In finding that Mr. Di Mare was not aware of such dangers as attended the operation under the conditions existing.

17. In failing to find that the negligence of the employees of American Stevedores, Inc. was the sole cause of the accident.

18. In failing to find that American Stevedores, Inc. failed in its duty to this respondent to use reasonable care in the performance of the work.

19. In failing to find that the negligence of this respondent, if any, was only passive and that this respondent was entitled to full indemnity from American Stevedores, Inc.

[fol. 103] 20. In failing to rule that this respondent was entitled to full indemnity from American Stevedores, Inc. under the contract, Exhibit G.

Dated: New York, N. Y., March 26, 1945.

John F. X. McGohey, United States Attorney, Proctor for Respondent, Office & Post Office Address, 45 Broadway, New York, N. Y. (6).

[fols. 104-105] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1945

In Admiralty, No. 96

ROSARIO PORELLO, Libellant-Appellee,

against

UNITED STATES OF AMERICA, Respondent-Appellant, and AMERICAN STEVEDORES, INC., Respondent-Impleaded-Appellant.

Appendix for American Stevedores, Inc., Respondent Impleaded—Appellee and Appellant—Filed October 22, 1945

[fol. 106] LIBELANT'S ANSWERS TO RESPONDENT'S INTERROGATORIES *

[Title omitted]

Libelant, answering the interrogatories propounded by Respondent-impleaded, states and alleges as follows:

1. Yes.

2. I have received voluntary payments at the rate of $20.00 per week until approximately April 7, 1943, without any formal award by a deputy commissioner.

3. I filed no claim for compensation.

4. I attended no conference, regarding my claim. On or about August 3, 1943, I submitted to a physical exam-
[fol. 107] ination. On March 30, 1943, I filed a notice of election to sue. On or about August 12, 1943, I again in-

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* Respondent's Interrogatories are printed on page 29A of the United States Appendix.

formed the Compensation Commission that I was proceeding with my third party claim.

5. Approximately March 30, 1943.

Dated, New York, September 28, 1944.

Yours, etc., Jacob Rassner, Proctor for Libelant, Office & P. O. Address, 220 Broadway, Borough of Manhattan, City of New York.

To: Alexander & Ash, Esqs., Proctors for Respondent-Impleaded, 76 Beaver St., New York City.

IN UNITED STATES DISTRICT COURT

EXCERPTS FROM TRANSCRIPT OF MINUTES

Mr. Ash: If your Honor please, I represent the American Stevedores, Incorporated, which, as Mr. Fanning states, has been brought in under the 56th rule in Admiralty. I assume that there can be, under no factual situation that can be proven here, any decree in favor of the libellant against the American Stevedores because his exclusive right as against us is under the U. S. Longshoremen & Harbor Workers Act. So that any liability that we may have is a liability over to the respondent but none direct to the libellant.

[fol. 108] I think the factual situation has been given to your Honor sufficiently so that you will not require any amplification from me at this time. I do not wish to discuss the question of the defense of compensation that we have set up at this time, unless your Honor desires to hear from me on that point, but I wish to say that I intend or hope to prove that there was a conscious acceptance of compensation by this libellant here after he knew that he had a right of cause of action against the third party, the United States.

Now that I think is a little different than some of the other cases that have been before this District Court, and that is, I hope to show that this suit was started I think on March 30th and until July the libellant continued to receive and accept and has obtained compensation payments, so that he took such compensation payments after he knew that he had a right of action against

the third party. And I say that that constitutes an irrevocable election. I do not argue that there has been any assignment of this cause of action which would require an order merely that there has been an election of his exclusive remedy.

Mr. Rassner: May I call your Honor's attention to the fact that Mr. Ash evidently overlooks that after the carrier, that is after March 26, 1943, after the carrier was put on notice that we intended to proceed against a third party, they voluntarily continued making payments, which is the custom with several companies, and that is in no wise by any order. It is just voluntary payments that they may or may not pay as they see fit. They had absolute notice in writing that we intended to proceed with the third party action.

* * * * * * *

FRANK IGNERI, for libellant.

Direct.

Q. What I am trying to find out is, what was said, what was the talk between the Army officer and Di Mare?

A. To take the beams off.

[fol. 109] Q. Tell us what was said.

A. They want to take the beam off and put it on top of them. Di Mare wanted to take the two beams out. The Army officer says, "Leave the other one stay, you got plenty of room on board."

* * * * * * *

Q. So you had about half the hatch open?

A. More than half, a little.

* * * * * * *

Q. Half of it was left closed?

A. That is right.

Q. Let me see if I have you correctly. The Army officer, is that the man you say told you——

A. No, not told me.

Q. Told who?

A. Told the hatch boss.

Q. Told Di Mare?

A. That is right.

Q. To take off one beam?

A. That is right.

Q. Where did he say he should put it?
A. On top of the far end.

• • • • • • •

Q. How about the Army officer, was he there the next day?

A. Yes, he was there all the time. He used to give us orders, even, how to stow cargo down the hatch, to the hatch boss; he used to give plenty to the hatch boss, how to stow cargo.

Q. Was it the same Army officer, the same one on the next day who was giving orders where to stow cargo?

A. From him. There was no——

Q. Was he there all through the work?

A. All through the work.

Q. Did anybody else come over and give orders?

A. No, just him.

Q. Just the one man?

A. That is right.

• • • • • • •

JAMES J. HESSION, for libellant.

Direct.

Q. Isn't it customary to take out the forward beam?

A. It is customary.

[fol. 110] Q. Will you tell us, if you know, why that beam was not taken out?

A. We were ordered to load the ship in a quick a time as possible and it was not necessary for it to come out.

Q. Who gave those orders?

A. I am quite sure that Fay gave them to us.

Q. Did you have anything to say about taking that beam out?

A. No, I didn't at the time, no.

Q. Was that beam left there under his specific orders or under general orders?

A. He was constantly around on the ship's side and he seen operations that was going on at the time.

• • • • • • •

Q. How about supervision and direction of orders?

A. The exact supervision of the ship became a matter for Captain Fay and this Army officer that came, as I say, from Washington.

Q. Now, was that unusual, that procedure?

A. In this particular case, yes; it was an unusual ship because it was an invasion ship.

* * * * * * *

Mr. Rassner: May it be stipulated on the record that the doctor and hospital bills in this case amount to $581.77?

The Court: Yes.

Mr. Ash: They were paid by the American Stevedores, Inc. or in its behalf by the Compensation Insurance Company—they were not paid by the libellant—under the Federal Compensation Law or pursuant to the Federal Compensation Law.

* * * * * * *

FRANCISCO J. L'LANSO, for respondent.

Cross.

Q. Is it not also true that in loading or unloading operations in a hold such as hold No. 1 here, that drafts will, when bring raised up or when being maneuvered in the hold—[fol. 111] that either part of the sling or sometimes part of the ship's gear will come up against the crossbeam?

A. If the cross-beam is in place, yes.

Q. Of course, if it is not there, they cannot come up against it. I am assuming it is in its place. That occurs almost every time that there is loading and unloading of a hold, is that not right?

A. Frequently so.

Q. When you are loading by means of spreaders, such as was being done in hold No. 1 on the day in question, there is a greater likelihood, is there not, that your draft and the spreaders will come up against a cross-beam than if you are loading a smaller unit of cargo in a draft?

A. That is correct.

Q. And is it not fair to say that a truck with spreaders being loaded into a hatch or into hatch No. 1 on this vessel, which is only partly opened, is a bulky cargo or draft to handle?

A. Yes, that is true.

* * * * * * *

Q. Was the Army in charge of the loading of the equipment?

A. There was an officer of the Quartermaster Corps, whose title was a "Troop Transport Quartermaster" in charge of loading the equipment.

Q. Not desiring to get tangled up in names which I cannot recall, was this Army officer whose rating you just gave us, was he in charge of the loading of the vessel on the day in question?

A. He was.

Q. And the loading was being done under his personal supervision, is that not correct?

A. That is correct.

* * * * * * *

Mr. Ash: May it be conceded that the respondent, American Stevedores, Inc., had by insurance with the American Mutual Liability Insurance Company, covered its employment at the time in question with the compensation, medical and hospitalization provided for in the U. S. Longshore-
[fol. 112] men's & Harbor Workers Compensation Act, and that the policy of insurance contained an endorsement known as the Longshoremen & Harbor Workers Compensation Act, and I offer a copy of the endorsement in evidence.

Mr. Rassner: The fact is conceded and the objection is made the same way, that it has no bearing on the case.

(Marked Respondent Impleaded's Exhibit O.)

Mr. Ash: May it be conceded that the libel was filed on March 29, 1943?

Mr. Rassner: That is a matter of record. You do not need a concession.

Mr. Ash: I would like to have it in the record. I agree that it is.

Mr. Rassner: It is so conceded.

Mr. Ash: And that payments were received by the libellant from the respondent, American Stevedore, Inc., or payments were made in the latter's behalf up to and including the payment of July 12, 1943, which covered the period from June 30, 1943, to July 30, 1943.

Mr. Rassner: That concession is made with this additional stipulation, that on or about March 26, 1943, libellant duly caused to be served upon the carrier and the employer a notice of intention to sue a third party.

Mr. Ash: I offer in evidence interrogatories Nos. 1 and 5 addressed to the libellant and the libellant's answers thereto.

Mr. Rassner: No objection.

Mr. Ash: With that I rest.

Mr. Rassner: At this time I respectfully move the Court to strike out the answers of both respondents in so far as [fol. 113] they deal with the question of compensation, in view of the fact that the evidence as disclosed at this trial shows that there has been no acceptance of compensation payments pursuant to an award made by a deputy commissioner as provided by Title 33, Section 933, subdivision (b) of the Longshoremen and Harbor Workers Act.

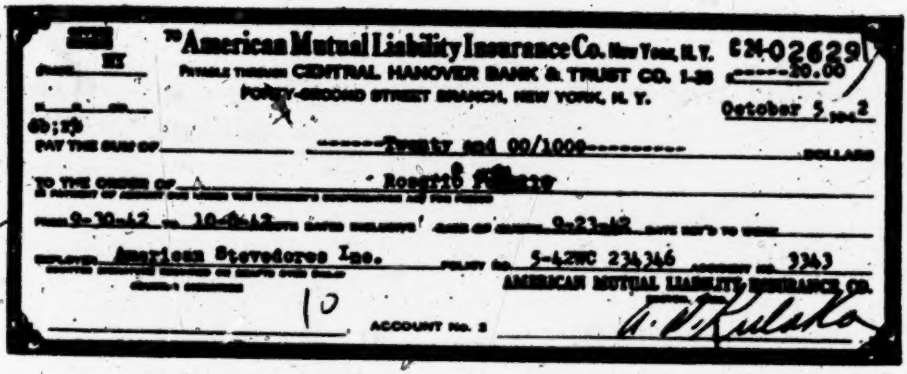
The Court: I am inclined to grant that motion, unless you can prove to me by some other law that I am wrong on it.

EXHIBIT H (RESPONDENT-IMPLEADED)

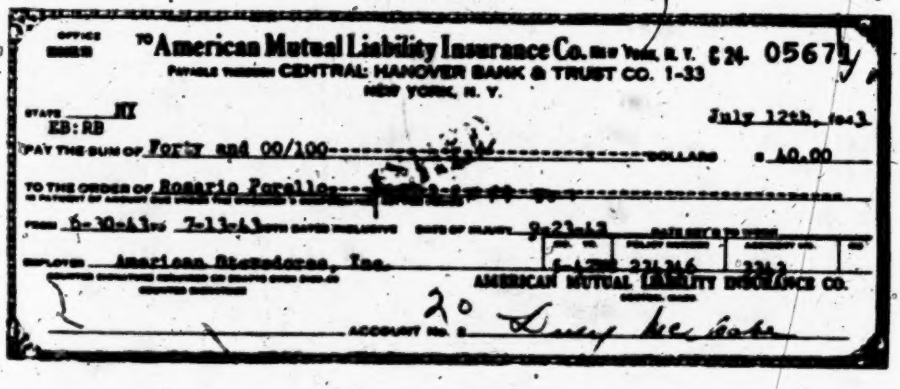
See next page

(Only the First and Last of the Compensation Checks are herein Reproduced.)

(All of the checks payable to libellant were endorsed and cashed by him.)



To American Mutual Liability Insurance Co. New York, N.Y. C24-02629
STATE NY
PAYABLE THROUGH CENTRAL HANOVER BANK & TRUST CO. 1-33
FORTY-SECOND STREET BRANCH, NEW YORK, N. Y.
$ 20.00
October 5 1942
db;rb
PAY THE SUM OF ------Twenty and 00/100---------- DOLLARS
TO THE ORDER OF Rosario Forello
FROM 9-30-42 TO 10-6-42 DATES PAYED INCLUSIVE CAUSE OF CANCEL 9-23-42 DATE SENT TO INSD.
EMPLOYER American Stevedores Inc. POLICY NO. 5-42WC 234346 ACCOUNT NO. 3343
AMERICAN MUTUAL LIABILITY INSURANCE CO.
10
ACCOUNT No. 3
A. C. Kulaka



To American Mutual Liability Insurance Co. New York, N.Y. C24 05671
PAYABLE THROUGH CENTRAL HANOVER BANK & TRUST CO. 1-33
NEW YORK, N. Y.
STATE NY
EB:RB
July 12th, 1943
PAY THE SUM OF Forty and 00/100---------- DOLLARS $ 40.00
TO THE ORDER OF Rosario Forello
FROM 6-30-43 TO 7-13-43 DATES PAYED INCLUSIVE CAUSE OF CANCEL 9-23-43 DATE SENT TO INSD.
EMPLOYER American Stevedores, Inc. POLICY NO. 5-42WC 234346 ACCOUNT NO. 3343
AMERICAN MUTUAL LIABILITY INSURANCE CO.
20
ACCOUNT No. 3
Daisy McCabe

Exhibit O (Respondent-Impleaded).

LONGSHOREMEN'S—HARBOR WORKERS' COMPENSATION ACT ENDORSEMENT

Endt. No.

The obligations of Paragraph 1 (a) of the Policy include the Longshoremen's and Harbor Workers' Compensation Act, being Public Act No. 803 of the 69th Congress, approved March 4, 1927, and all laws amendatory thereof or supplementary thereto which may be or become effective while this Policy is in force.

The Company will carry out the provisions of Section 26 of said Act. Insolvency or bankruptcy of the employer and/or discharges therein shall not relieve the Company from payment of compensation and other benefits lawfully due for disability or death sustained by any employee during the life of the Policy.

The Company agrees to abide by all the provisions of said Act and all lawful rules, regulations, orders, and decisions of the United States Employees' Compensation Commission and of the Deputy Commissioner having jurisdiction, unless and until set aside, modified, or reversed by a court having jurisdiction of the parties and the subject matter.

If this Employer is a contractor the subject of whose contract includes operations covered by this Policy and he shall sub-contract all or any part of such contract to one or more sub-contractors the remuneration of all the direct employees of all such sub-contractors shall be included in the terms of remuneration under the provisions of this Policy upon which premium is computed. Such remuneration as reported shall be considered the remuneration of employees of this Employer and shall in all business be governed by the same terms, conditions, requirements and obligations of the Policy as the remuneration of the direct employees of this Employer. The requirements of this paragraph shall not apply as regards any such sub-contractor who has secured compensation for his direct employees as required by the Longshoremen's and Harbor Workers' Compensation Act but this Employer shall not claim the benefit of this exemption unless and until he shall notify the Company by certification or otherwise that any such sub-contractor has legally secured the payment of compensation to his own direct employees and then only respecting any sub-contractor who has furnished such proof.

This endorsement shall not be cancelled prior to the date specified in this Policy for its expiration until at least thirty days have elapsed after a notice of cancellation has been sent to the Commission, to the Deputy Commissioner, and to this Employer.

All terms, conditions, representations and obligations expressed in this Policy or in any other endorsement attached thereto which are not inconsistent with or inapplicable to the provisions of this endorsement are hereby made a part of this endorsement as fully and completely as if wholly written herein.

Reference to the law of any state in Conditions B and D of this Policy are hereby declared to include, for the purposes of this endorsement only, the provisions of the Longshoremen's and Harbor Workers' Compensation Act.

This endorsement is effective May 1 19 42 at 12:01 A.M., standard time at the address of the insured as described in the declarations, and is attached to policy no. WC 234 146-B issued to Dorrance-Sturgis, Inc.

expiring May 1 19 43

AMERICAN MUTUAL LIABILITY INSURANCE COMPANY

J. P. Mullaney
Secretary

Charles E. Hodges
President

FEDERAL

Countersigned Victor A. Trundy
Authorized representative

[fol. 117] [Title omitted.]

ASSIGNMENT OF ERROR OF AMERICAN STEVEDORES, INC.

The American Stevedores, Inc., respondent-impleaded in the above entitled proceeding, hereby assigns error in the proceedings, decrees, order of the District Court in the above entitled action, as follows:

1. In that the District Court failed to find that the libellant was precluded from maintaining any suit or proceeding herein by reason of his acceptance from his employer, the American Stevedores, Inc., of compensation under the provisions of the U. S. Longshoremen's & Harbor Workers Compensation Act, 33 U. S. C. 905, et seq.

2. In that the Court failed to find and adjudge that libellant's exclusive remedy was under the said enactment.

[fol. 118] 3. In that the District Court dismissed the first, separate and distinct defense set forth in paragraphs Ninth to Thirteenth inclusive of the answer of the American Stevedores, Inc., to the amended libel and to the petition of the United States of America.

4. In that the District Court held that the United States of America was entitled to indemnity from the American Stevedores, Inc. and entered a decree so adjudging.

5. In that the District Court held that the said American Stevedores, Inc. was liable over by way of indemnity or otherwise, to the United States and that it had violated some obligation or duty owing to it.

Dated, New York, March 15, 1945.

Alexander & Ash, Proctors for American Stevedores, Inc., respondent-impleaded, cross-appellant, 76 Beaver Street, New York City.

[fol. 119] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1945

No. 96

(Argued November 14, 1945 Decided January 10, 1946.)

Docket No. 19904

ROSARIO PORELLO, Libellant-Appellee,

v.

UNITED STATES OF AMERICA, Respondent-Appellant,

and

AMERICAN STEVEDORES, INC., Respondent-Impleaded-Appellant

Before: L. Hand, Swan and Frank, Circuit Judges

Appeal from the District Court of the United States for the Southern District of New York

Libel for damages for personal injuries sustained by the libellant aboard a public vessel of the United States, wherein the respondent impleaded the libellant's employer, [fol. 120] American Stevedores, Inc. From a final decree awarding recovery against the respondent and adjudging that it have contribution from American Stevedores, Inc. for one-half the libellant's damages, less certain credits, both the respondent and the impleaded respondent have appealed. Decree modified.

John F. X. McGohey, United States Attorney, for respondent-appellant; Howard F. Fanning and Thomas H. Walker, of counsel.

Alexander & Ash, Proctors for impleaded respondent-appellant; Edward Ash, Advocate.

Jacob Rassner, Proctor for appellee.

SWAN, *Circuit Judge:*

This is a suit brought under the Public Vessels Act, 46 U. S. C. A. § 781, against the United States to recover damages for personal injuries sustained by a stevedore, while stowing cargo in the hold of the Navy Transport

"Thomas Stone." The libellant was in the employ of the impleaded respondent, American Stevedores, Inc., which was engaged under contract with the United States in loading the vessel. He was seriously injured by the falling of a strongback from the hatch of the third platform deck into the No. 1 lower hold. The district court held the vessel owner at fault for supplying a strongback which was defective in that it lacked the customary locking device on one end, and held the stevedoring company at fault because its foreman negligently loaded the cargo in a manner which caused the strongback to be unshipped. The libellant was given a decree against the United States for [fol. 121] $11,719.39, less $1,421.77 already received by way of compensation under the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. A. § 901 *et seq.*, and the United States was given contribution from American Stevedores, Inc., for one-half the damages less the above mentioned credit. Both the United States and the stevedoring company have appealed.

The United States contends (1) that the suit does not lie under the Public Vessels Act, (2) that the absence of a locking device on the strongback was not the proximate cause of the accident, and (3) that, if liable to the libellant, it is entitled to complete indemnity from the impleaded respondent. The latter contends that the decree is wrong in awarding contribution to the United States in any amount. The libellant has filed assignments of error asserting inadequacy in the award of damages and asks us to increase it.

The question of jurisdiction under the Public Vessels Act was raised by exceptions to the libel. They were overruled in *Porello* v. *United States*, 53 F. Supp. 569. Any doubt as to the correctness of that ruling is set at rest by the recent decision of the Supreme Court in *Canadian Aviator, Ltd.* v. *United States*, 324 U. S. 215, 228 where the court said that the statute was intended to impose on the United States the same liability imposed by the admiralty law on the private shipowner. That a private shipowner would be liable to a stevedore for personal injuries caused by defective equipment or negligence is elementary. *La Guerra* v. *Brasileiro*, 124 F. 2d 553 (C. C. A. 2, cert. den. 315 U. S. 824; *U. S. Fidelity & Guaranty Co.* v. *United States*, 152 F. 2d —— (C. C. A. 2, Nov. 9, 1945). The district judge found that the failure to have

a lock on the strongback was negligent. The evidence [fol. 122] supports this finding. Such a lock is customary, and the plans of the vessel called for it; but no lock was installed and its lack was visible to the naked eye. The United States really offers no excuse for its failure, but contends that the proximate cause of libellant's injuries was the negligence of the stevedoring company.

At the time of the accident the libellant was one of a gang of stevedores stowing cargo in No. 1 lower hold. The work was in charge of Di Mare, foreman of the gang. A military vehicle had been lowered into the hold and landed on the tank top preparatory to stowing it in the starboard wing aft. The vehicle was handled by wire slings, the perpendicular parts of which were separated by wooden spreaders above the top of the vehicle to prevent the wire from scraping it. After the vehicle was landed Di Mare ordered the winchman to "pick it up a little." As the vehicle did not move, in response to the order, it was repeated. The raising of the vehicle unseated the strongback, causing it and a number of the hatch cover planks to fall into the hold and hit the libellant. Di Mare, the foreman, knew that the lock was missing and should have realized the danger of unseating the strongback, if the vehicle was raised. The trial judge found Di Mare was negligent in handling the draft, and that the libellant's injuries resulted from the negligence of both the respondent and the stevedoring company. Each wrongdoer claims that the other's negligence was the sole cause of the accident. The United States argues that its fault created a situation which was harmless while cargo was being lowered into the hold and only became dangerous by reason of the supervening negligence of the gang foreman in ordering the vehicle to be raised in such a manner as to unseat the strongback. In support of the argument counsel cites *The M. E. Luckenbach*, 200 F. 630, aff'd 214 F. 571 [fol. 123] (C. C. A. 2); *The Sunnyside*, 251 F. 271 (C. C. A. 2); *The Mars*, 9 F. 2d 183 (S. D. N. Y.); *The Aden Maru*, 51 F. 2d 599 (S. D. Texas). The stevedoring company, on the other hand, argues that had the beam been locked, the raising of the vehicle against it would not have unshipped it and consequently the absence of the lock was the efficient, *i. e.*, proximate, cause of the accident. The unsound notion that there can be but one "proximate cause" of an accidental injury has caused some confusion

in the cases. None of the authorities cited is applicable to the facts at bar. In our opinion the absence of the lock and Di Mare's negligent order operated concurrently in producing the result. Hence both the tort-feasors would be jointly and severally liable and each should bear one-half the libellant's damages except for the statutory immunity granted by section 5, 33 U. S. C. A. § 905, which makes the compensation liability exclusive with respect to the employer.

For a right of contribution to accrue between tort-feasors, they must be joint wrong-doers in the sense that their tort or torts have imposed a common liability upon them to the party injured. A. L. I. Restitution § 86; 13 Am. Jur., Contribution § 51. Since the libellant has no cause of action against his employer, the United States can claim no contribution on the theory of a common liability which it has been compelled to pay. See *Consolidated Coach Corp. v. Burge*, 245 Ky. 631, 54 S. W. 2d 16, 85 A. L. R. 1086; *Walker-Kroger Grocery & Baking Co.*, 214 Wis. 519, 252 N. W. 721, 92 A. L. R. 680. It claims full indemnity by reason of its contract with American Stevedores, Inc. This required the stevedoring company to carry insurance protection against liability to its employees arising under the Longshoremen's and Harbor Workers' Compensation Act; and contained also the following provision:

> [fol. 124] "The Stevedore * * * shall be responsible for any and all damage or injury to persons and cargo while loading or otherwise handling or stowing the same, * * * through the negligence or fault of the Stevedore, his employees and servants."

The impleaded respondent argues that the provision must be construed as though the final clause read "through the negligence or fault of the Stevedore alone"; that it did not agree to indemnify the United States against damages to which a defect in the ship's equipment contributed. But we do not think the contract can be limited to negligence or fault for which the stevedore alone was liable. The stevedore's agreement to carry compensation insurance forbids that construction, because, having insured, it would not be liable to the person injured. It is reasonable to construe the clause to cover cases where in respect to the injured person both the contractor and the shipowner

are at fault. See *United States* v. *Wallace*, 18 F. 2d 20, 21 (C. C. A. 9). The primary duty to furnish its employees a safe place to work rested on the stevedore. It was in control of the conditions under which the work was to be done and its foreman knew the bolt was missing and should have foreseen the danger and avoided it. Although the stevedore's default in that respect might not relieve the shipowner from liability to the injured workman, it would make it reasonable for the shipowner to insist that the stevedore alone bear the loss, and the quoted provision was inserted in the contract for that purpose. The United States argues that, even without such a provision, it would be entitled to full indemnity. See *Washington Gas Light Co.* v. *District of Columbia*, 161 U. S. 316, 327; *Burris* v. *Am. Chicle Co.*, 120 F. 2d 218, 222 (C. C. A. 2); *Seaboard Stevedoring Corp.* v. *Sagadahoc S. S. Co*, 32 F. [fol. 125] 2d 886 (C. C. A. 9). However that may be, we think the contract entitles it to full indemnity and the decree must be modified accordingly.

American Stevedores, Inc. in its answer pleaded that the court lacked jurisdiction to grant any recovery to the libellant because by accepting compensation payments he elected to pursue his remedy under the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. A. § 933(a). According to paragraph (a) of section 933 the election is to be made "by giving notice to the deputy commissioner in such manner as the commission may provide"; no other method of election is specified. The effect of accepting compensation payments is prescribed in paragraph (b) of the section. Before the 1938 amendment of paragraph (b), mere acceptance of compensation operated as an assignment to the employer of the employee's cause of action against a third person; since the amendment, the acceptance must be "under an award in a compensation order" to effect such an assignment. See *Grasso* v. *Lorentzen*, 149 F. 2d 127, 128 (C. C. A. 2), cert. den. 14 Law W. 3128. In the case at bar, the libellant filed no claim for compensation but did file on March 30, 1943 notice of election to sue the third party. His acceptance of voluntary payments of compensation without any award did not, in our opinion, impair his capacity to sue. Cf. *Ross* v. *C. D. Mallory Corp.*, 1943 A. M. C. 729 (N. J. Sup. Ct.).

Finally, we come to the libellant's contention that the damages awarded him were inadequate. Although the

libellant did not appeal, he filed assignments of error pursuant to Rule 38(3) of the rules of this court. An appellate court may increase an award in admiralty. *Standard Oil Co.* v. *Southern Pac. Co.*, 268 U. S. 146, 155; *The Spokane*, 294 F. 242 (C. C. A. 2), cert. den. 264 U. S. 583; *Browne* v. *Great Lakes Transp. Corp.*, 5 F. 2d 58 (C. C. A. 2). The [fol. 126] district court's opinion states that the damages awarded were composed of the following items: Pain and suffering to date $1,000; future pain and suffering $1,000; loss of earnings to date $3,000; present value of future loss of earnings $6,000; hospital expenses $581.77—a total of $11,581.77. At the date of the accident September 23, 1942 Porello was 55 years old, which gave him a life expectancy of 17 years. His earnings for the year preceding the accident were $3,000, but the trial judge found that his average earnings were $1,500. He found also that his injuries "permanently incapacitate him from performing further heavy manual labor, but do not prevent him from doing other work of a less strenous nature." and estimated his disability to be 25%. In computing the loss of future earnings the district judge took $375 as the annual loss and capitalized it at 2½% for the full life expectancy. It is clear from the medical testimony that putting the disability at 25% was much too low. The man was incapable of any active work and there is no evidence that he had qualifications which might fit him for an office job. We think a disability of 75% would be closer to the facts. The average earnings were also taken at too low a figure. The libellant's earnings from July 1, 1938 up to his accident in September 1942 show a yearly average of $1700. On the other hand capitalization at 2½% for 17 years was too favorable to the libellant both in respect to the rate and the number of years he could continue to do the heavy work of a stevedore. If we took an annual loss of $1275 (75% of $1700) capitalized at 3% for ten years, the present value of future loss of earnings would be $11,200. In computing future losses we think the trial judge was justified in taking the libellant's average yearly earnings rather than earnings for the year immediately pre-[fol. 127] ceding the accident. But in computing wages lost during the two years preceding the trial, in view of the demand for longshoremen's services during the war, of which we may take judicial notice, we think the allowance for this item should be $6,000 instead of $3,000. The allowance for pain, $2,000, seems unduly small in view of the

medical testimony. We raise it to $4,000. Making the corrections above suggested would give a total award of $21,781.77. The award of damages is increased to that figure.

The decree is modified in accordance with the foregoing opinion and, so modified, is affirmed.

[fol. 128] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 10th day of January one thousand nine hundred and forty-six.

Present: Hon. Learned Hand, Hon. Thomas W. Swan, Hon. Jerome N. Frank, Circuit Judges.

ROSARIO PORELLO, Libellant-Appellee,

v.

UNITED STATES and WAR SHIPPING ADMINISTRATION, Respondent-Appellant; American Stevedores, Inc., Respondent-Impleaded-Appellant

Appeal from the District Court of the United States for the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On consideration whereof it is now hereby ordered, adjudged, and decreed that the decree of said District Court be and it hereby is modified in accordance with the opinion of this court with costs, and as so modified, affirmed.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Alexander M. Bell, Clerk.

[fol. 129] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. Rosario Porello v. United States of America, et al. Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed Jan. 10, 1946. Alexander M. Bell, Clerk.

[fol. 130] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 96

October Term 1945, in Admiralty

ROSARIO PORELLO, Libellant-Appellee,

against

UNITED STATES OF AMERICA, Respondent-Appellant

and

AMERICAN STEVEDORES, INC., Respondent-Impleaded-Appellant

Petition of American Stevedores, Inc., Respondent Impleaded, for a Limited Rehearing

On January 10, 1946, this Court filed its opinion written by Circuit Judge Swan, and concurred in by Circuit Judges Learned Hand and Frank, modifying the decree of the District Court (1) by increasing the damages found by the District Court and (2) directing that the United States recover full indemnity from the respondent impleaded, American Stevedores, Inc.

This petition for a rehearing is limited only to so much of this Court's opinion as directs complete, rather than one-half, indemnity by the United States against the American Stevedores, Inc. No other conclusion is sought to be considered upon such rehearing.

[fol. 131] A

This court has affirmed the findings of the court below that the negligence of both the respondent and respondent-impleaded concurred in causing the injury to libellant. In holding that contribution does not lie between these joint tort feasors *in admiralty*, this court proceeded on the theory that the statutory immunity granted by 33 U. S. C. A. §905, created no *common liability* in that libellant could not sue his employer and in support thereof cited *Consolidated Coach Corp.* v. *Burge*, 245 Ky. 631 and *Walker-Kroger Grocery & Baking Co.*, 214 Wis. 519. These cases are inapplicable to this admiralty proceed-

ing. A reading of each will show that they were actions at law involving automobiles, the court in each construing local statutes. As was said in *The Tampico,* 45 F. Supp. 174, where the shipowner, Hedger, who had been sued *in admiralty* by the injured longshoreman, impleaded the stevedore, Nicholson, from whom it sought contribution (p. 175):

> "The libellant being free from fault is entitled to recover from Hedger, who by its negligence contributed to libellant's injuries, to the full extent of his damages. *The Hamilton,* 207 U. S. 398, 406, 28 S. Ct. 133, 52 L. Ed. 264; *The Atlas,* 93 U. S. 302, 23 L. Ed. 863. *Nicholson's liability to Hedger must be decided in accordance with the admiralty principle of the right to contribution between wrongdoers. Analogies attempted to be drawn from other sources are without persuasive force.* 'The rule of the common law, even, that there is no contribution between wrongdoers, is subject to exception (citation). Whatever its origin, the admiralty rule in this country is well known to be the other way (citations) * * *'. *Erie R. R. Co.* v. *Erie Transportation Co.,* 204 U. S. 220, 225, 27 S. Ct. 246, 247, 51 L. Ed. 450." (Italics supplied.)

[fol. 132] "The right to contribution belongs to the substantive law of admiralty. It is not a mere incident of a form of procedure"—Mr. Justice Holmes in *Lehigh Valley R. R. Co.* v. *Cornell Steamboat Co.,* 218 U. S. 264, 31 S. Ct. 17. Procedurally, the libellant in this case could not bring a direct action against his employer but certainly, by virtue of the libellant's injury, *a common liability was created because of the joint tort.* The libellant's *remedies* against the joint tort feasors do not characterize the liability. The right to contribution is a consequence of the joint tort and attaches to the joint liability. *Benedict on Admiralty* (6th Ed.), Vol. 2, §353, p. 552.

The right to contribution, *in admiralty,* does not depend upon a common liability or remedy to the party injured. Thus, we see that under the Harter Act the cargo owner has no remedy against the carrying vessel for errors in navigation. Yet, the non-carrying vessel, found mutually at fault with the carrying vessel, recovers from the carry-

ing vessel one-half of the damages paid or to be paid to the carrying vessel's cargo, although the carrying vessel could not be sued directly by the cargo owner. *In re United Steel Products Co.* (C. C. A. 2), 24 F. (2d) 657; *The Chattahoochee*, 173 U. S. 540; *Aktieselskabet Cuzco* v. *The Sucarseco*, 294 U. S. 394. As was said in *Davis* v. *Molyneaux*, 7 F. (2d) 172, 173, "It (contribution) is dependent upon the admiralty doctrine that *the burden of injuries resulting from common fault shall be equally borne by those responsible.*" To same effect, see *The Mariska* (C. C. A. 7), 107 F. 989.

As recently as October 1945, Circuit Judge Learned Hand wrote in *Barbarino* v. *Stanhope S. S. Co.*, 151 F. (2d) 553, where the parties were identically situated as in the instant suit, that the shipowner, whose impleading petition had been dismissed by the Trial Court, had a very real interest to hold in the stevedore-impleaded in order to obtain contribution. The Court said (p. 555 of 151 F. 2d):

> [fol. 133] "Whether that would be enough interest to support an appeal we need not decide, *because the suit is in admiralty where contribution between joint tort feasors has existed since 1875. The Alabama*, 92 U. S. 695, 23 L. Ed. 763. The consequence of that right is that the shipowner has a very real interest in holding the stevedore liable." (Italics supplied.)

The fact that there is a statutory immunity from direct suit by the libellant does not militate against contribution, if, as has been held here, the stevedore be a joint tort feasor. As was said in *Rederii* v. *Jarka Corp.*, 26 F. Supp. 304, appeal dismissed 110 F. (2d) 234, where a shipowner in an independent admiralty action sought indemnity or contribution for payments made to respondent's employee (p. 305):

> "If the longshoreman's right of action against the vessel was not taken away by the Act, he can libel the vessel as before, *and an owner of the vessel who is obliged to pay damage has the same rights and remedies against other persons as he had before the Act was passed.*" (Italics supplied.)

Also in *The Tampico* (pp. 175, 176 of 45 F. Supp.):

> "The immunity given Nicholson (stevedore) by the statute from suits arising out of libellant's (longshore-

man's) injuries furnishes no defense against Hedger's (Shipowner's) claim to contribution as between joint tort-feasors."

Therefore, *irrespective of contract,* under the substantive law of admiralty, in contradistinction to any other body of law, contribution exists in the instant action, the parties initially having been found to be joint tort feasors.

[fol. 134] B

The interpretation given by this Court to the indemnity provision is not only against authorities in this and other circuits, but virtually makes the stevedore an insurer of the negligence of the shipowner. If this interpretation prevails, not only is every shipowner *indemnified in toto for its own negligence,* no matter how gross, but the stevedore can never obtain insurance coverage, whether P & I or compensation, as it has assumed by contract a risk which makes it a guarantor of the performance of some third party. The interpretation of this contract, as now made by this Court, will not only foster and perplex litigation in the shipping industry but will reach out, encompass, and govern every conceivable industry wherein independent contractors are in privity by virtue of contract. In arriving at this interpretation of the contract, this Court cited *United States* v. *Wallace,* 18 F. (2d) 20. However, this court may have overlooked the holding in the cited case. *There the United States, shipowner, was held solely at fault* since its workmen caused the injury. In construing a United States Shipping Board contract, incorporating an indemnity clause similar to the instant one, the court, in denying indemnity in favor of the United States from its contractor, said that there must be expressed in *unequivocal* terms the intent of the indemnitor to indemnify for the indemnitee's negligence (p. 21 of 18 F. 2d). In *North American Ry. Const. Co.* v. *Cincinnati Traction Co.,* 172 F. 124, the Circuit Court of Appeals, 7th Circuit, said that *clear language* must appear for such a result. The Circuit Court of Appeals, 6th Circuit, in *Buckeye Cotton Oil Co.* v. *Louisville & N. R. Co.,* 24 F. (2d) 347 said such a result must have been *clearly intended.* In *Southern Bell Telephone & Telegraph Co.* v. *Mayor and Board of Aldermen,* 74 F. (2d) 983, the Circuit Court of Appeals, 5th Circuit, said such a result required *unequivocal terms.* The construction

[fol. 135] presently placed upon this type of contract by this court is contrary to *this* Circuit's previous decision in *Shamrock Towing Co.* v. *City of New York*, 16 F. (2d) 199.

In the last cited case, a libel was filed for damages for breach of charter in that respondent, City of New York, had returned scows in damaged condition. The City of New York impleaded the Manhattan Ash Removal Corporation which was employed under contract with the City to unload the scows.

The contract contained the following indemnity provision:

> "After scows, either city owned or chartered from private parties, have been delivered to the contractor for unloading, he shall assume full responsibility and be liable for all damages caused to them either at or by the unloading machines or by the negligent acts or ommissions of the contractor, his servants, agents or employees, until returned to the department; the contractor shall reimburse the city for all damages which shall be caused to its vessels or those chartered by it, and shall save the city harmless from all claims for damages which may be made against it by the owners of chartered scows, caused while in the contractor's care and custody either by his unloading machinery or by the negligent acts or omissions of the contractor, his agents, servants or employees; such liability shall continue until such scows are returned to the department;" (Record on Appeal in cited case, p. 14 thereof).

The decree in the District Court went against Manhattan Ash Removal Corporation solely and it appealed. In modifying and holding the city for half-damages, Circuit Judge Hand said (p. 201 of 16 F. 2d):

> [fol. 136] "There remains only the question of the appellant's agreement with the city to hold it harmless for its 'negligent acts and omissions'. *This seems to us only to cover cases in which the City's liability to the scow owners arose without fault on its part.* It is quite true that the loss was here caused by the appellant's acts of discharging the scows without having proper fire protection, but it was also as much caused by the city's tender of the scows and insistence that the work should proceed. It would be a harsh and

unreasonable construction of the words to extend them to such a case, in which the city could not even enforce contribution at common law. *Union Stock Yards* v. *Chicago etc. R. R. Co.*, 196 U. S. 217, 25 S. Ct. 226, 49 L. Ed. 453, 2 Ann. Cas. 525." (Italics supplied.)

If it had been the intention of the parties to this contract that American Stevedores Inc. indemnify the United States for the latter's negligence, solely or concurrently with that of American Stevedores, Inc., the contract would have recited that indemnity was to be had by the United States for damages "for which either or both of the parties hereto may or shall be liable", as was in issue in *Kokusai Kisen Kabushiki Kaisha* v. *Columbia Stevedoring Co. Inc.*, 23 F. Supp. 403, 404, aff'd (C. C. A. 2—1938) 100 F. 2d 1016. *A priori*, it never was the intention of the parties that such a result obtain herein.

In *Weldon* v. *United States*, 65 F. (2d) 748, the shipowner sought to implead the stevedore *under a similar contract including a similar indemnity clause, as in the instant case* (p. 749 of 65 F. 2d—middle of right hand column). In the cited case, the indemnity clause (middle of right hand column, p. 749) provided that the stevedore agrees:

[fol. 137] "Also indemnifying the Owner against any damage or injury to cargo, while handling or stowing the same, and to any ship, including its equipment or apparel, wharves, docks, lighters, elevators, cars and car floats used in connection therewith, through negligence or fault of the Stevedore."

The contract in the instant case is to be found at page 22a of Appendix to brief of United States of America and the similarity is striking. In construing this contract in the cited case, the Circuit Court of Appeals, 1st Circuit, said (p. 749 of 65 F. 2d):

"It would be extraordinary to impose upon a stevedore liability for the negligence of a shipowner with respect to permanent structures on the ship, over which the stevedore has no duty of maintenance and no control whatever. • • • The intent of the contract obviously is that the stevedore shall carry insurance to protect its obligations to its employees and to the general public, in case of accidents arising out of its work.

If it had been intended that the stevedore should also carry insurance protecting the owner of the vessel against claims for negligence based on defects in its permanent structures, it cannot be doubted that the contract would have said so." (Italics supplied.)

If, as gleaned from the opinion of this Court, the contract of indemnity is ambiguous, such ambiguity should be construed against the author of the contract, the United States. If this court is of the opinion as was the Circuit Court of Appeals, 1st Circuit, in *Smith, Kirkpatrick & Co.* v. *Columbian S. S. Co.*, 88 F. (2d) 392, 394, that "Admiralty contracts are usually ambiguous in some respects and in construing them the courts must endeavor to determine the true intention of the parties", it is respectfully urged that [fol. 138] this court exercise its discretion to permit further proof to be taken as to the intent of the parties to this contract. *The Silver Palm*, 94 F. (2d) 754; *Petterson Lighterage & Towing Corp.* v. *New York Central R. Co.*, 126 F. (2d) 992.

The record is barren of any evidence as to the intention of the parties to the indemnity provision in the contract. No finding relative to the same was made by the District Court (pp. 95a and 96a of Appendix to Brief of The United States of America), nor was any reference made thereto in the opinion of the Trial Court (pp. 92a-96a of Appendix to Brief of The United States of America). Indeed none of the parties supposed the question, now decided by this Court, to be crucial. We, therefore, respectfully urge this Court to follow the procedure set forth in its Per Curiam opinion of July 13, 1945, on the petition for rehearing, in *Waldie* v. *Steers Sand & Gravel Corporation*, wherein it said (151 F. [2d] 132):

> "The judge made no finding as to the consignee's negligence, and the question was probably not tried out as fully as it would have been, *had it then been supposed to be crucial.* Now that our reversal of the decree against the tug has made it so, *it seems to us equitable not to dismiss the libel as against the charterer on this record; but to remand the cause for further trial, though between these two parties only.*" (Italics supplied.)

In connection therewith, American Steyedores, Inc., will move this court on February 4, 1946 for leave to take such further testimony relative to the intent of the parties to the contract.

C

There is indeed strong doubt, if not authority to the contrary, that admiralty has no jurisdiction over the contract of indemnity. It was left open in *Shamrock Towing Co.* v. [fol. 139] *City of New York* (facts set forth on pp. 6, 7 hereof), 16 F. (2d) 199, 201, wherein Circuit Judge Hand said:

> "Thus we need not consider whether in any case admiralty could take cognizance of the contract, even to the extent of using it to determine where between the two the loss should fall."

However, in *The Wonder*, 79 F. (d) 312, Circuit Judge Augustus N. Hand writing for this Circuit said (pp. 313, 314 of 79 F. 2d):

> "The original contract between the city and E. O. Roberts Company, Inc. provided that the contractor 'should be responsible for all injuries to persons or damage to property either directly or indirectly that may result from his operations for which otherwise the City of New York might be liable'. *The trial court held the city solely liable, and properly refused to enforce the contract to save the latter harmless for the reason that the obligation was not maritime and therefore did not come within the jurisdiction of a court of admiralty.*" (Italics supplied.)

Even performing judicial surgery upon this contract, as suggested by Circuit Judge Learned Hand in *Compagnie Francaise de Navigation A Vapeur* v. *Bonnasse*, 19 F. (2d) 777, the provisions of indemnity, here involved, comprise that part of the contract which is non-maritime.

As aforestated, the petitioner, American Stevedores, Inc., is applying to this Court upon motion returnable February 4, 1946, for leave of this Court to permit all parties to this proceeding to take proof as to the intention of the parties relative to the indemnity clause.

It may be that this Court may desire to withhold its determination on this application for a rehearing, pending

[fol. 140] the determination of that motion and, in the event that the motion is granted, await the coming in of such proof, so that this application for rehearing can be considered simultaneously with, and in the light of, such further proof.

The effect of this Court's decision, as it now stands, is widespread. It affects every stevedoring contractor working under contracts similar to the one in question, and we believe that this Court can take judicial notice of the fact that during the period of World War II, and up to the present time, almost all stevedoring in this and other ports was being performed under similar Governmental contracts.

Wherefore, it is respectfully submitted that this Court grant a rehearing respecting the intent of the parties to the indemnity clause in the contract and the right of contribution as between the two parties thereto, found herein to have been concurrently negligent for causing the injuries to the libellant.

Respectfully submitted, Alexander & Ash, Proctors for Respondent-Impleaded-Appellant.

Edward Ash, Sidney A. Schwartz, Advocates.

Dated, New York, January 23, 1946.

I hereby certify that I have examined the foregoing petition and in my opinion it is well founded and entitled to the favorable consideration of the Court and that it is not filed for the purpose of delay.

Edward Ash.

[fol. 141] Sirs:

Please take notice that a petition for rehearing, of which the foregoing is a copy, was this day filed in the office of the Clerk of the U. S. Circuit Court of Appeals for the Second Circuit.

Dated, New York, January 23, 1946.

Yours, etc., Alexander & Ash, Proctors for American Stevedores, Inc., Respondent-Impleaded-Appellant, 76 Beaver Street, New York City.

To: John F. X. McGohey, Esq., Proctor for United States of America, 45 Broadway, New York City. Jacob Rassner, Esq., Proctor for Libellant-Appellee, 220 Broadway, New York City.

[fol. 142] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1945

No. 96

(Petition for Rehearing Submitted January 23, 1946. Decided January 31, 1946)

Docket No. 19904

ROSARIO PORELLO, Libellant-Appellee,

against

UNITED STATES OF AMERICA, Respondent-Appellant,

and

AMERICAN STEVEDORES, INC., Respondent-Impleaded-Appellant

Before L. Hand, Swan and Frank, Circuit Judges

On Petition by American Stevedores, Inc., for Rehearing

Alexander & Ash, Proctors for petitioner.

[fol. 143] PER CURIAM:

This petition for rehearing is limited to so much of our decision as grants full, rather than one-half, indemnity to the United States against the impleaded respondent, American Stevedores, Inc. The petitioner argues that our opinion is erroneous in applying common law principles of contribution to a suit in admiralty in which we have affirmed findings that the libellant's injury resulted from the concurrent negligence of both the respondent and the impleaded respondent. We are by no means convinced that the rule of *The Chattahoochee*, 173 U. S. 540, which was not previously called to our attention, is controlling in a situation such as this, but the point may be considered left open since determination of the right of contribution is not essential to decision as to indemnity under the respondent's contract.

The petitioner asserts that our interpretation of the indemnity contract is contrary to the authorities in this and other circuits. We do not so read them. *Shamrock Towing Co.* v. *City of New York*, 16 F. 2d 199, is the case cited

from our own circuit. There a libel was filed against the city for breach of charter in failing to return the chartered scows in good condition. The city impleaded a corporation which was employed under contract to unload the scows. The chartered scows were damaged by fire and both the city and the contractor were held liable to the libellant for negligent failure to supply fire protection at the dumping ground. A further question was whether the contractor was bound to stand the whole loss because of its agreement to hold the city harmless for damages caused to the scows "by the negligent acts or omissions of the contractor." We held the contract to cover only "cases in which the city's liability to the scow owners arose without fault [fol. 144] on its own part." Since the city might be liable to the scow owner under its charter without fault on its part, it was possible to limit the indemnity provisions as we did without depriving them of all utility. In the case at bar, however, the United States could be liable only if itself at fault; hence a similar construction here would make the indemnity provision meaningless. Without analyzing the authorities from other circuits cited by the petitioner it will suffice to say that none of them, in our opinion, is contrary to the decision we have reached. Nor need we be troubled by doubt as to admiralty jurisdiction extending to a contract of indemnity, since jurisdiction could rest on the fact that the indemnitee is the *United States*, 28 USCA § 41(1); see *Tuthill* v. *United States*, 38 F. 538 (N. D. Ill.), app. dis., 136 U. S. 652.

Petition for rehearing denied.

[fol. 145] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 31st day of January, one thousand nine hundred and forty-six.

Present: Hon. Learned Hand, Hon. Thomas W. Swan, Hon. Jerome N. Frank, Circuit Judges

ROSARIO PORELLO, Libellant-Appellee,

v.

UNITED STATES OF AMERICA, Respondent-Appellant,

AMERICAN STEVEDORES, INC., Respondent-Impleaded-Appellant

A petition for a rehearing having been filed herein by counsel for the American Stevedores, Inc.,

Upon consideration thereof, it is Ordered that said petition be and hereby is denied.

Alexander M. Bell, Clerk.

[fol. 146] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. Rosario Porello, v. United States of America and Another. Order. United States Circuit Court of Appeals: Second Circuit. Filed Jan. 31, 1946. Alexander M. Bell, Clerk.

[fol. 147] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1945

No. 96

ROSARIO PORELLO, Libellant-Appellant,

against

UNITED STATES OF AMERICA, Respondent-Appellant,

and

AMERICAN STEVEDORES, INC., Respondent-Impleaded-Appellant

SIRS:

Please Take Notice that upon the record on appeal in the above entitled proceeding, the petition for limited rehearing filed herein on January 23, 1946, by the undersigned, and the annexed affidavits of Gus Blair Chiarello, Frank W. Nolan, and Edward Ash, the undersigned will move this Court at a stated term for motions to be held at the United States Court House, Foley Square, in the Borough of Manhattan, City of New York, on February 4, 1946, at 10:30 A. M., on said day, or as soon thereafter as counsel can be heard, for the entry of an order or orders (1) permitting any party hereto to take proof to be submitted to this Court as to the intent of the parties respecting the indemnity clause in the agreement of July 17, 1942, or (2) remanding this proceeding to the District Court for further hearing herein as to the intent and meaning of the indemnity clause in said agreement and (3) staying the issuance of the mandate herein pending further order of this Court, (4) and for such other and further relief [fol. 148] in the premises as the Court may deem just and proper.

Dated: New York, January 23, 1946.

Alexander & Ash, Proctors for American Stevedores, Inc., 76 Beaver Street, New York City.

To: John F. X. McGohey, Esq., Proctor for United States of America, Southern District of New York, 45 Broadway, New York City. Jacob Rassner, Esq., Proctor for Libellant-Appellee, 220 Broadway, New York City.

[fol. 149] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

ROSARIO PORELLO, Libellant-Appellant,

against

UNITED STATES OF AMERICA, Respondent-Appellant,

and

AMERICAN STEVEDORES, INC., Respondent-Impleaded-Appellant

STATE OF NEW YORK,
Southern District of New York, ss:

Gus Blair Chiarello, being duly sworn, deposes and says:

I am Vice-President and Operating Manager of American Stevedores, Inc., respondent-impleaded in the above-entitled proceeding.

I was one of the members of the contracting stevedore's committee which took up with representatives of the United States the proposed stevedoring contract, which resulted in the final form of the contract signed by the American Stevedores, Inc., with the Government on July 17, 1942. That is the contract involved in this action and pursuant to which the American Stevedores, Inc., was loading Army cargo aboard the USS "Thomas Stone" on September 23, 1942, when the libellant, Porello, was injured.

[fol. 150] During the time of the discussion of the form of the stevedoring contract, and the terms that were to be embraced in it, there was no suggestion, intimation or contention made either by the representatives of the Government themselves or the stevedoring contractors present that the indemnity clause which is paragraph 12 of the contract, was intended to provide that the stevedoring contractor was to indemnify the United States for any claim or damage due to the negligence of the United States or any defect in the appliances, machinery, etc., of its vessels. Certainly such was not the intent of the American Stevedores, Inc., when it executed the agreement dated July 17, 1942. The intent of the indemnity clause of the agreement, as I understand it, and as I believe the representatives of the United States and the other stevedoring contractors

understood it, was that the stevedoring contractor was to indemnify the United States only for the negligence of the contracting stevedore.

The agreement of July 17, 1942, was drawn and prepared by the United States and delivered to American Stevedores, Inc., in final form for signature, whereupon it was signed, executed and returned to the Government for execution by it.

I have read the opinion of this Honorable Court, dated January 10, 1945 and am generally familiar with the factual situation in this action. It was not contemplated or intended at the time that the American Stevedores, Inc., entered into the agreement dated July 17, 1942, that it would be called upon to indemnify the United States under a factual situation such as is present in this action. I do not believe that the representatives of the United States with whom the contract was discussed contemplated or intended that a stevedoring contractor, such as the American Stevedores, Inc., would be called upon, or obligated to, the Government for the Government's own negligence or any defect in the vessel's appliances such as was present in this case.

[fol. 151] The interpretation given by this Honorable Court to the indemnity clause of the agreement is most important and has alarming effect, because the indemnity clause was universally used, I believe, in almost all stevedoring contracts. The interpretation placed upon that clause by this Honorable Court places upon stevedores generally, and upon the American Stevedores, Inc., in the instant case, a risk and obligation which it was not intended they should assume. It calls upon them to answer for the negligence of the United States and defects in its steamers' equipment which they did not contemplate at the time the contract was entered into. It was not within the contemplation of the contracting stevedores, or my company, that if both the United States or the ship whereon stevedoring work was being done, were both negligent that the stevedoring contractor should indemnify the United States for the total amount of any liability.

It is respectfully requested, by deponent in behalf of the American Stevedores, Inc., that permission be granted by this Court to take testimony upon the subject of this affidavit to the end that the true and intended purpose of

the indemnity clause can be presented to it for its further consideration.

Gus Blair Chiarello (Sgd.)

Sworn to before me, this 18 day of January, 1946.
Walter Gans, Notary —, Queens Co. (Seal.)

[fol. 152] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1945

No. 96

ROSARIO PORELLO, Libellant-Appellant,

against

UNITED STATES OF AMERICA, Respondent-Appellant, and American Stevedores, Inc., Respondent-Impleaded-Appellant

STATE OF NEW YORK,
Southern District of New York, ss:

Frank W. Nolan, being duly sworn, deposes and says:

I reside at 305 Hartford Road, South Orange, N. J., and am now, and was for sometime prior to 1942, the Chairman of the Stevedoring Committee of The Maritime Association of the Port of New York.

I am also the President of The Jarka Corporation which has been for many years past engaged in stevedoring operations in the Port of New York.

I, as Chairman of the aforesaid Committee, was active in the conferences with the representatives of the United States Army Transport Corps, which resulted in the form of contract to be used by the Government and stevedores in connection with the loading and unloading of Govern- [fol. 153] ment operated vessels in this Port. One of the clauses of the Agreement, known as the "Indemnity Clause" in its final form reads as follows:

> "The Stevedore performing any service under this schedule shall be responsible for any and all damage or injury to persons and cargo while loading or otherwise

handling or stowing the same, to any ship including its apparel and equipment, wharves, docks, lighters, elevators, cars and carfloats used in connection therewith, through the negligence or fault of the Stevedore, his employees and servants."

It is my recollection that when the quoted clause was discussed that there was no contention made by the Government representatives that it was the intent of such clause that a Stevedore performing work for the Government under the contract was to indemnify, or be liable to the Government for any negligence on the part of the Government or the defective equipment of its ships. It was intended by the above quoted clause that a Stevedoring contractor was to be liable to and indemnify the Government solely for the Stevedore's own negligence. It was never the intention that the Stevedore was to indemnify or be liable to the Government for the negligence of the Government in the event that the Stevedore and the Government, or its ships, were jointly liable for injuries to any party. It was the intent of the quoted clause that the Stevedore was to remain liable for and only indemnify the Government for the Stevedore's own negligence.

I have read the opinion of this Court dated January 10, 1946, in the above entitled action, and after the reading [fol. 154] thereof it is my opinion based upon the negotiations had with the Government representatives prior to the agreement as to the form of contract in effect in July, 1942, that it was not intended that the Stevedore was to indemnify the Government under the facts set forth in the opinion.

The opinion referred to is of particular importance not only to the Jarka Corporation of which I ame the President, but, in my opinion, to all those engaged in Stevedoring operations, as all Stevedores working under U. S. Army Transport contracts had substantially the same indemnity clause.

If the liability imposed upon Stevedores as set forth in the opinion referred to is to remain unchanged, it will, in my opinion impose upon them an obligation not contemplated by them or the Government at the time they entered into the

Army Agreements which incorporate the indemnity clause above quoted.

Frank W. Nolan.

Sworn to before me, this 17th day of January, 1946. Thos. F. Bergin, Notary Public, Suffolk County. Cert. filed in N. Y. Co., No. 1052. Commission Expires March 30, 1946. (Seal.)

[fol. 155] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

ROSARIO PORELLO, Libellant-Appellant,

against

UNITED STATES OF AMERICA, Respondent-Appellant, and American Stevedores, Inc., Respondent-Impleaded-Appellant

STATE OF NEW YORK,
Southern District of New York, ss:

Edward Ash, being duly sworn, deposes and says:

I have been in charge of all prior proceedings in behalf of the American Stevedores, Inc., in the above entitled Admiralty proceeding. In its behalf, I tried the case in the District Court and argued the appeal in this Court.

The instant application is made in the light of this Court's construction and determination of the effect of the indemnity agreement, referred to on page 616 of its opinion. Therein this Court said

> "It is reasonable to construe the clause to cover cases where in respect to the injured person both the contractor and shipowner are at fault." See United States v. Wallace, 18 F. 2d 20, 21 (C. C. A. 9).
>
> . . . . . .
>
> [fol. 156] "Although the stevedore's default in that respect might not relieve the shipowner from liability to the injured workman, it would make it reasonable for the shipowner to insist that the stevedore alone

bear the loss, and the quoted provision was inserted in the contract for that purpose."

No testimony or other proof respecting the intent of the parties to such agreement was offered in the District Court nor was any finding of fact nor conclusion of law made with respect thereto. The intent of the indemnity clause in the agreement was not discussed by the District Court in its opinion.

The indemnity clause was not deemed ambiguous until given the construction by this Honorable Court in its opinion. Had there been any indication of ambiguity or that the intent of the indemnity clause was that stated by this Court, then upon the trial of this case in the District Court, proof as to the intent of the United States and the American Stevedores, Inc., would have been given with respect thereto. Such proof would have consisted in substance of that set forth in the affidavits annexed hereto. No proof as to this subject was offered by any party to the proceeding.

The determination of this Court as to the intent and meaning of the indemnity clause transcends and is far wider in scope than solely to affect the interests of the parties to the instant proceeding. Such indemnity clause, deponent is informed, and as is set forth in the annexed affidavits, is of almost universal use in stevedoring contracts covering operations in this and other ports.

Deponent believes that it would be in furtherance of the ends of justice in this matter, and in keeping with the [fol. 157] desire of this Court to ascertain the facts in any matter before it, to permit the parties hereto to adduce evidence before this Court, or before the District Court, as to the intention of the parties to the agreement insofar as the meaning of the indemnity clause is concerned. To permit the production and submission of such evidence, even at this time, would not prejudice any of the parties to this proceeding but would enable a final adjudication on this point to be made by the Court in the light of, and based upon, a complete statement of the facts and the actual intention of the parties.

Accordingly, deponent as proctor of the American Stevedores, Inc., asks that this Court, in the exercise of its discretion, permit any of the parties to this proceeding to take proof as to the intent of the parties respecting the

said indemnity agreement and the interpretation of those who negotiated such agreement prior to its execution, either before a commissioner to be appointed by this Court, or before a notary public, or by remanding this proceeding for further proceedings and hearing to the District Court upon such limited question. The latter indicated course would permit a hearing in open Court before a District Judge and its making of a finding of fact and conclusion of law with respect thereto which could then, if any party desired, be reviewed by this Court.

Edward Ash.

Sworn to before me, this 22nd day of January, 1946. Harriet R. Brook, Notary Public, Kings County. Kings Co. Clk's No. 866. Reg. No. 738-B-7. N. Y. Co. Clk's No. 1653. Reg. No. 1258-B-7. Commission Expires March 30, 1947. (Seal.)

[fol. 158] [Endorsed:] No. 96—October 1945 Term. United States Circuit Court of Appeals for the Second Circuit. Rosario Porello, Libellant-Appellant, against United States of America, Respondent-Appellant, and American Stevedores, Inc., Respondent-Impleaded-Appellant. Notice of Motion. Motion Denied. L. H., T. W. S., J. N. F. Feb. 18, 1946. C. JJ.

[fol. 159] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 19th day of February, one thousand nine hundred and forty-six.

Present: Hon. Learned Hand, Hon. Thomas W. Swan, Hon. Jerome N. Frank, Circuit Judges.

ROSARIO PORELLO, Libellant-Appellant,

v.

UNITED STATES OF AMERICA, Respondent-Appellant, AMERICAN STEVEDORES, INC., Respondent-Impleaded-Appellant

A motion having been made herein by counsel for Respondent-Impleaded-Appellant to permit any party hereto to take proof to be submitted to this court as to the

intent of the parties respecting the indemnity clause in the agreement of July 17, 1942, or for other and further relief and to stay issuance of the mandate,

Upon consideration thereof, it is

Ordered that said motion be and it hereby is denied.

Alexander M. Bell, Clerk.

[fol. 160] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. Rosario Porello, v. United States & Ano. Order. United States Circuit Court of Appeals, Second Circuit. Filed Feb. 19, 1946. Alexander M. Bell, Clerk.

[fol. 161] UNITED STATES OF AMERICA, SOUTHERN DISTRICT OF NEW YORK

I, Alexander M. Bell, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages numbered Part I, 1a to 103a; Part II, 1 to 13; Part III, I to XLII inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of Rosario Porello, Libellant-Appellant, against United States of America, Respondent-Appellant, and American Stevedores, Inc., Respondent-Impleaded-Appellant, as the same remain of record and on file in my office.

In Testimony Whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 21st day of February, in the year of our Lord one thousand nine hundred and forty-six, and of the Independence of the said United States the one hundred and seventieth.

Alexander M. Bell, Clerk.

[fol. 147] SUPREME COURT OF THE UNITED STATES

[Title omitted.]

ORDER ALLOWING CERTIORARI—Filed May 6, 1946

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Jackson took no part in the consideration or decision of this application.

[fol. 148] IN THE SUPREME COURT OF THE UNITED STATES

[Title omitted.]

STIPULATION AS TO RECORD—Filed June 5, 1946

It Is Hereby Stipulated and Agreed by and between the proctors for the respective parties hereto, that the record in the Supreme Court of the United States on writ of certiorari, heretofore granted, shall consist solely of the appendix to the brief of the United States of America in the Circuit Court of Appeals, the appendix to the brief of American Stevedores, Inc. in the Circuit Court of Appeals, and the proceedings had in the Circuit Court of Appeals.

Dated, New York, May 10, 1946.

Jacob Rassner, Proctor for Rosario Porello, Respondent; J. Howard McGrath, Solicitor General, Proctor for United States of America, Respondent; Edward Ash, Proctor for American Stevedores, Inc., Petitioner, 76 Beaver, N. Y. C.